VOLUME I

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 217

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 21, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 217

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Origina	Print
Proceedings in U. S. C. A. for the Fifth Circuit		1
Caption (Omitted in printing)	A	
Petition for enforcement of an order of the National Labor Relations Board	1	1
Order, July 5, 1951	2	1
Appendix A—List of employees' names	6	4
Appendix B—Form of notice posted pursuant to a decision and order	7	4
Order to file petition	9	5
Proceedings before National Labor Relations Board	10	5
Charge against employer	10	6
Complaint	13	7
Appendix A—List of employees' names (Copy) (Omitted in printing)	20	11
Notice of hearing, November 15, 1949	20	11
Notice of hearing (Copy) (Omitted in printing)	22	12
Motion for extension of time within which to file answer to complaint	23	12
Order extending time for filing answer	25	13
Motion for bill of particulars	26	13
Order reserving ruling for the trial examiner	29	15
Order postponing hearing	30	15
Answer	31	16
Order re bill of particulars, December 13, 1949	35	18
Bill of particulars	36	18

231648—52——1

	Original	Print
Proceedings before National Labor Relations Board—Con.		
Motion to strike portions of complaint	40	20
Orders designating trial examiner	41	21
Letter requesting extension of time to file brief	43	22
Telegram granting extension	45	23
Order transferring case to the National Labor Relations Board	46	24
Letter requesting oral argument	47	24
Telegram requesting extension of time to file brief	48	25
Telegram granting extension	49	26
Exceptions to intermediate report of the trial examiner by respondent	50	26
Exceptions to intermediate report by National Labor Relations Board	60	32
Charging parties' response to employer's exceptions to intermediate report of the trial examiner	62	33
Decision and order, January 26, 1951	71	38
Intermediate report and recommended order, September 28, 1950	78	42
Appendix A—List of employee's names (Copy) (Omitted in printing)	112	63
Appendix B—Form of notice posted pursuant to the recommendations of a trial examiner, etc	113	63
Certificate of the National Labor Relations Board	115	65
Response and answer	119	67
Argument and submission	123	71
Opinion, Strum, J	124	72
Judgment	128	76
Petition for rehearing	129	77
Order denying rehearing	134	82
Clerk's certificate	134	82
Decree	135	83
Appendix A—List of employees	138	86
Appendix B—Form of notice posted pursuant to a decree, etc	139	87
Order allowing certiorari	141	89

1 In the United States Court of Appeals for the Fifth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEVEN UP BOTTLING COMPANY OF MIAMI, INC., RESPONDENT

Petition for Enforcement of an order of the National Labor Relations Board

Filed July 9, 1951.

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151, et. seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Seven Up Bottling Company of Miami, Inc., Miami, Florida, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Seven Up Bottling Company of Miami, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local Union No. 390, Case No. 10–CA–619."

2 In support of this petition the Board respectfully shows:

(1) Respondent is a Florida corporation engaged in business in the State of Florida, within this judicial circuit where the *the* unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all procedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on January 26, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, its officers, agents, successors, and assigns. The aforesaid order provides as follows:

Order

July 5, 1951

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Seven Up Bottling Company of Miami, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local Union No. 390, as the exclusive representative of the Respondent's driver-salesmen and trainee driver-salesmen;

(b) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, or any other labor organization of its employees, by refusing to reinstate any of its employees because of their union membership or activity or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, as the exclusive representative of all rates of pay, wages, hours of employment, and other employees in the appropriate unit with respect to conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Offer to the employees named in Appendix A, attached to the Intermediate Report immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner set forth in the section of the Intermediate Report entitled "The remedy";

(c) Make whole the employees whose names are set forth in Appendix A, attached to the Intermediate Report in the manner set forth in the Section of the Intermediate Report entitled "The remedy," for any loss of pay each may have suffered as a result

of the Respondent's discrimination against them on September 16, 1948;

(d) Upon request, make available to the National Labor Relations Board, or its agent, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary for a determination of the amounts of back pay due and the right of reinstatement under the terms of this Order;

(e) Post at both its plant and office in Miami, Florida,
5 copies of the notice attached to the Intermediate Report and marked Appendix B.[1] Copies of the notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent, immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(f) Notify the Regional Director for the Tenth Region in writing within ten (10) days from the date of this Decision and Order, what steps the Respondent has taken to comply herewith.

(3) On January 26, 1951, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Whereas, the Board prays this Honorable Court that it cause
notice of the filing of this petition and transcript to be
6 served upon Respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring

[1] This notice, however, shall be, and it hereby is, amended by striking from line 3 thereof the words "The Recommendations of a Trial Examiner" and substituting in lieu thereof the words "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

Respondent, its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR RELATIONS BOARD,
(S) A. Norman Sommers,
(A. NORMAN SOMERS),
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., this 5th day of July 1951.

Appendix A

Walter F. Croon, Nat Freeman, Joseph L. Klein, Lawrence T. Nesta, Marion L. Walls, James P. Yost, Robert D. MacCubbin, T. Shannon, L. Case, Charles F. Fisher, Robert W. Studley.

7

Appendix B

NOTICE TO ALL EMPLOYEES

Pursuant To A Decision And Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in International Brotherhood Of Teamsters, Chauffeurs, Warehousemen And Helpers Of America, A. F. L., Local Union No. 390, or in any other labor organization of our employees, by refusing to reinstate any of our employees because of their union membership or activities or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization is authorized in Section 8 (a) (3) of the National Labor Relations Act.

We Will, upon request, bargain collectively with International Brotherhood Of Teamsters, Chauffeurs, Warehousemen
8 And Helpers Of America, A. F. L., Local Union No. 390, as the exclusive representaive of all our employees in the appropriate unit, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

all driver-salesmen and trainee driver-salesmen.

We Will Offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination.

Walter F. Croon, Nat Freeman, Joseph L. Klein, Lawrence T. Nesta, Marvin L. Walls, James P. Yost, Robert D. MacCubbin, T. Shannon, L. Case, Charles F. Fisher, Robert W. Studley.

All our employees are free to become or remain, or to refrain from becoming or remaining, members in good standing of the above-named union or any other labor labor organization except to the extent that this right may be affected by an agreement
9 in conformity with Section 8 (a) (3) of the National Labor Relations Act.

SEVEN UP BOTTLING COMPANY
OF MIAMI, INC.,
(*Employer.*)

By ——— ———,
(*Representative*) (*Title*).

Dated ———

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

In United States Court of Appeals

[Title omitted.]

Order to file petition

Filed July 9, 1951

A petition for the enforcement of an order of the National Labor Relations Board made on January 26, 1951, "In The Matter of Seven Up Bottling Company of Miami, Inc., and International Brotherhood Of Teamsters, Chauffeurs, Warehousemen And Helpers of America, A. F. L., Local Union No. 390, Case
10 No. 10-CA-619," N. L. R. B. having been presented to this Court,

It Is Ordered that said petition be filed and the case docketed as of July 9th, 1951, and

It Is Further Ordered that upon the filing with the Clerk, of a certified copy of a transcript of the proceedings of the National Labor Relations Board in the above entitled matter, the Clerk shall forthwith give notice thereof to the said respondent.

(Signed) WAYNE G. BORAH,
U. S. Circuit Judge.

Dated July 9th, 1951.

Before National Labor Relations Board

Charge against employer

1. Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that (Name of employer) 7-Up Bottling Company at (Address of establishment) (Street) 1655 North Miami Ave., Miami, Fla., (City) Miami (State) Florida (Number) employing * * * Workers in (Nature of business) Beverage has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) subsections (1) and (3) of said Act, in that:

2. On or about September 7, 1948, eight driver-salesmen employed for the above company were forced to strike because of the firm's refusal to recognize them as Union members. On several occasions between the 7th and the 14th of September these men offered their services to return to work pending the findings of the N. L. R. B., and the company flatly refused to reemploy any of these men because of their Union affiliation.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

3. (Paragraphs 3, 4, and 5 apply only if the charge is filed by a labor organization.) The labor organization filing this charge, hereinafter called the union, has complied with Section 9 (f) (A), 9 (f) (B) (1), and 9 (g) of said Act as amended, as evidenced by letter of compliance issued by the Department of Labor and bearing code number 1233–390. The financial data filed with the Secretary of Labor is for the fiscal year ending December 31, 1947.

A certificate has been filed with the National Labor Relations Board in accordance with Section 9 (f) (B) (2) stating the method employed by the union in furnishing to all its members copies of the financial data required to be filed with the Secretary of Labor.

4. Each of the officers of the union has executed a non-Communist affidavit as required by Section 9 (h) of the Act.

5. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9 (f), (g), and (h) of the Act.

6. (Full name of labor organization, including local name and number, or person filing charge) International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 390 (Address) (Street) 127 NE. 1st Ave., (City) Miami (State) Florida (Telephone number) 3–4544.

7. (Full name of national or international labor organization of which it is an affiliate or constituent unit) International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers (Address) (Street) 222 E. Michigan St., (City) Indianapolis, (State) Indiana (Telephone number) ————.

By JOHN LUNEN,
(Signature of representative or person filing charge)
Secretary-Treasurer and Business Manager, *(Title, if any)*.

Do Not Write In This Space:
Case No. 10-CA-619.
Date filed 2-7-49.
9 (f), (g), (h) cleared.
[*Duly sworn to by Edward Edwardsen, Jr.; jurat omitted in printing.*]

13 *Complaint*

November 15, 1949

Before the National Labor Relations Board

TENTH REGION

[Title omitted.]
Date, 2/7/50; Witness, G. C. Reporter, L. Peak; No. Pages, 6.

It having been charged by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, (herein called the Union), that Seven Up Bottling Company of Miami, Inc. (herein called the Respondent), has engaged in, and is now engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 61 Stat. 136 (herein called the Act), the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board (herein called the Board), has caused the Regional Director for the Tenth Region, as agent for the Board, designated by the Board's Rules and Regulations, Series 5, as amended, Section 203.15, to issue this Complaint and allege as follows:

I

14 The Respondent, Seven Up Bottling Company of Miami, Inc., is, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Florida.

II

At all times material herein, the Respondent has maintained its principal office and place of business at Miami, Florida (herein called the Miami plant), where it is now, and has been continuously engaged in the bottling, sale and distribution of a beverage known as "7-UP."

III

The Respondent, in the course and conduct of its business operations during the twelve-month period ending December 31, 1948, purchased raw materials and supplies, consisting principally of syrup, bottles, caps, containers and sugar, valued in excess of $100,000.00, more than 60 percent of which was purchased outside the State of Florida, and shipped in interstate commerce to the Miami plant. During the same period, the Respondent bottled and sold finished products, consisting principally of the bottled beverage "7-UP," valued in excess of $260,000.00, all of which were sold and shipped to customers within the State of Florida.

IV

The Union is a labor organization within the meaning of Section 2 (5) of the Act.

V

All driver-salesmen and trainee driver-salesmen employed at the Miami plant, excluding plant help, clerical employees, casual employees, route managers and guards, professional employees, and supervisors, as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

VI

On or about August 17, 1948, a majority of the employees in the unit described in paragraph V above, designated and selected the Union as their representative for the purpose of collective bargaining.

VII

At all times since August 17, 1948, the Union has been the representative for the purposes of collective bargaining of a majority of the employees in the aforesaid unit, and has, by virtue of Section 9 (a) of the Act, been the exclusive representative of all employees in said unit described in paragraph V above, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

VIII

On or about August 17, 1948, August 19, 1948, August 25, 1948, August 30, 1948, September 7, 1948, September 9, 1948, September 16, 1948, and at all times thereafter, the Union requested the Respondent to bargain collectively in respect to rates of pay, wages, hours of employment, and other conditions of employment, with the Union as the exclusive representative of all the employees of the Respondent in the unit described in paragraph V above.

16 IX

On or about August 17, 1948, August 19, 1948, August 25, 1948, August 30, 1948, September 7, 1948, September 9, 1948, September 16, 1948, and at all times thereafter, the Respondent did refuse, and continues to refuse, to bargain collectively with the Union as the exclusive representative of all the employees in the unit described in paragraph V above.

X

From August 11, 1948, or thereabouts, to date, the Respondent, by its officers, agents, and employees, more particularly by A. J. Tobin, Sherman Tobin, Charles M. Dismukes, and Charles Carnifax, has committed, authorized, instigated and acquiesced in the following acts and conduct:

(a) Interrogating its employees concerning their union affiliation and activities;

(b) Threatening and warning its employees to refrain from assisting, becoming members of, or remaining members of the Union;

(c) Offering its employees wage increases and other benefits on condition that they refrain from assisting, becoming members of, or remaining members of the Union.

XI

On or about September 7, 1948, the employees of the Re-
17 spondent, whose names are set forth in "Appendix A," annexed hereto and made a part hereof, ceased work concertedly and went on strike.

XII

The strike described in paragraph XI above, was caused and prolonged by the unfair labor practices of the Respondent described in paragraph IX and X above.

XIII

On or about September 7, 1948, September 9, 1948, September 10, 1948, September 14, 1948, September 16, 1948, and at all times thereafter, the employees who engaged in the strike described in paragraph XI above, and whose names are set forth in the aforesaid "Appendix A" unconditionally applied for reinstatement to their former or substantially equivalent positions of employment.

XIV

On or about September 7, 1948, September 9, 1948, September 10, 1948, September 14, 1948, September 16, 1948, and at all times thereafter, the Respondent refused, and continues to refuse, to reinstate the employees whose names are set forth in the aforementioned "Appendix A" to their former or substantially equivalent positions of employment.

XV

The Respondent did refuse, and does continue to refuse, 18 to reinstate the employees whose names are set forth in the aforementioned "Appendix A" for the reason that they joined and assisted the Union, and for the reason that they participated in the strike described in paragraph XI above and refused to work during said strike.

XVI

By the acts described in paragraph IX above, in connection with the allegations contained in paragraphs V, VI, VII, and VIII above, the Respondent did refuse, and continues to refuse, to bargain collectively with the representatives of its employees, and thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

XVII

By the acts described in Paragraph XIV and XV above, the Respondent did discriminate, and is discriminating, in regard to the hire and tenure of employment of those employees whose names are set forth in the aforementioned "Appendix A", and thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

XVIII

By the acts described in Paragraphs IX, X, XIV and XV above and by each of said acts, the Respondent interfered with, restrained and coerced, and is interfering with, restraining, and coercing, its employees in the exercise of the rights guaran-
19 teed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

XIX

The activities of the Respondent, set forth in Paragraphs IX, X, XIV, and XV above, occurring in connection with the operations of the Respondent described in Paragraphs I, II, and III above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes, burdening and obstructing commerce, and the free flow of commerce.

XX

The acts of the Respondent described above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1), (3) and (5), and Section 2 (6) and (7) of the Act.

Wherefore, on this 15th of November, 1949, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused the Regional Director for the Tenth Region to issue this Complaint against Seven Up Bottling Company of Miami, Inc., the Respondent herein.

20 *Appendix A* (*Omitted, printed side, page 6 ante*)

Notice of hearing

November 15, 1949

Before National Labor Relations Board

[Title omitted.]

Please Take Notice that on the 3rd day of January 1949 at ten o'clock in the morning, Dade County Court House, Miami, Florida, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

21 A copy of the Charge upon which the Complaint is attached hereto.

You are further notified that, pursuant to section 203.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, and answer to the said Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

In Witness Whereof the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Complaint and Notice of Hearing to be signed by the Regional Director for the Tenth Region on this 15th day of November, 1949.

Paul L. Styles,
(PAUL L. STYLES),
Regional Director, National Labor Relations Board.

(Address) Atlanta National Building, Atlanta, Georgia.

22 *Notice of hearing (Omitted, printed side page 20 ante)*

23 Before National Labor Relations Board

[Title omitted.]

Motion for extension of time within which to file answer to complaint

November 23, 1949

Now Comes the undersigned as Counsel for the Respondent in the above matter, and does hereby request an extension of time within which to file an Answer in the above matter until December 20, 1949.

24 For grounds thereof, Counsel shows that it is necessary to prepare the Answer and have it submitted to Miami for verification, and to prepare the pleadings in the above matter, which will necessitate a delay in filing said Answer.

Respectfully submitted.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.
By FRANK A. CONSTANGY,
Of Counsel

NOVEMBER 23, 1949.

ALBERT BERNSTEIN,
BERNSTEIN & HODDON,
Seybold Building, Miami, Florida.

FRANK A. CONSTANGY,
1404 Candler Building, Atlanta 3, Georgia,
Attorneys for Respondent.

25 Before National Labor Relations Board

[Title omitted.]

Order extending time for filing answer

November 25, 1949

Whereas Counsel for the Respondent on November 23, 1949, filed Motion for Extension of Time Within Which to File Answer to Complaint in the above matter;

It Is Hereby Ordered that the time for filing Answer be, and the same hereby is, extended to December 20, 1949.

Dated this 25th day of November, 1949, at Atlanta, Georgia.

[SEAL] Paul L. Styles,
(PAUL L. STYLES),
Regional Director National Labor Relations Board.

Atlanta National Building, Atlanta, Georgia.

26 Before National Labor Relations Board

[Title omitted.]

Motion for bill of particulars

Received November 29, 1949

Now Comes the undersigned as Counsel for the Respondent in the above matter, and files this, its Motion for Bill of Particulars, as to certain paragraphs of the Complaint issued in the above matter, on November 15, 1949.

I

Respondent shows that Paragraph IX of said Complaint alleges that on seven separate dates in August and September 1948, and at all times thereafter, Respondent did refuse, and continues to refuse to bargain collectively with the charging Union. Respondent respectfully requests that in connection with this paragraph of the Complaint it be supplied with the particulars as to wherein the Respondent has refused to bargain, and upon what occasions it has refused to bargain, in order that it will be able to fully answer and prepare its defense to the allegations of said paragraph.

27

II

Respondent shows that Paragraph X of said Complaint alleges that from August 11, 1948, to date, the Respondent, through four persons, engaged in four separate series of acts in violation of the National Labor Relations Act. Respondent shows that in the absence of more specific information as to which of said four persons engaged in which of the specified acts set forth in Paragraph X, and the approximate time of such acts or actions, that it is unable to fully answer and prepare its defense to the allegations of said Paragraph. Respondent respectfully requests that the General Counsel of the National Labor Relations Board be directed to furnish it with a Bill of Particulars as to said Paragraph X, wherein he specifies the names of the persons alleged to have committed each of the alleged acts and the approximate dates thereof.

III

Respondent shows that Paragraphs XIII and XIV of said Complaint allege that on five separate dates in September 1948, and at all times thereafter, that said employees specified in Appendix "A" of the Complaint unconditionally applied for reinstatement to their former positions, and that Respondent refused and continues to refuse to reinstate said employees. Respondent shows that unless it is furnished with information as to where, and to whom, said applications were made, and as to the person who has, or did refuse to accept such applications, it will be unable to fully answer and prepare its defense to the allegations of
28 said paragraph. Wherefore, Respondent respectfully requests that an Order be entered, directing the General Counsel to advise the Respondent specifically, as to each of the persons listed in Appendix "A" of the Complaint, the places and the names of the persons to whom each made application for unconditional reinstatement, and/or the names of the persons by whom these said applications for unconditional reinstatement were rejected.

IV

Respondent further shows that it has obtained an extension of time within which to file its Answer to said Complaint until December 20, 1949. Respondent respectfully requests that an Order directing that it be furnished with a Bill of Particulars be entered promptly, and that said Order direct the furnishing of such

particulars within such time as will permit Respondent to file its Answer to the Complaint without further extension.

Respectfully submitted.

SEVEN-UP BOTTLING CO.
OF MIAMI, INC.,
By FRANK A. CONSTANGY,
Of Counsel.

ALBERT BERNSTEIN,
BERNSTEIN & HODSDON,
Seybold Bldg., Miami, Fla.
FRANK A. CONSTANGY,
1404 Chandler Bldg., Atlanta, Ga.,
Attorneys for Respondent.
NOVEMBER 28, 1949.

29 Before National Labor Relations Board

[Title omitted.]

Order reserving ruling for the Trial Examiner

November 29, 1949

Whereas the respondent in the above-entitled matter on November 29, 1949, filed its Motion for Bill of Particulars;

It Is Therefore Ordered that ruling upon said Bill of Particulars be, and the same hereby is, reserved for and transferred to the Trial Examiner.

Dated this 29th day of November 1949 at Atlanta, Georgia.

[SEAL] Paul L. Styles,
(PAUL L. STYLES),
Regional Director, National Labor Relations Board.
Atlanta National Building, Atlanta, Georgia.

30 Before National Labor Relations Board

[Title omitted.]

Order postponing hearing

December 6, 1949

Whereas the hearing in the above matter is now set for January 3, 1950, at ten o'clock in the morning, Dade County Court House, Miami, Florida;

It Is Hereby Ordered that the hearing be, and the same hereby is, postponed to February 7, 1950, at the same hour and place.

Dated at Atlanta, Georgia, this 6th day of December 1949.

[SEAL] John W. Thomas,
(JOHN W. THOMAS),
Acting Regional Director, National Labor Relations Board.

Atlanta National Building, Atlanta, Georgia.

31 Before National Labor Relations Board

[Title omitted.]

Answer

Now comes the Respondent in the above matter and files this its Answer to the Complaint in the above matter, subject to and without waiving terms of the Motion for Bill of Particulars filed by it on November 28, 1949, and for Answer thereto shows:

I

Respondent admits the allegations of Paragraphs I and II of the said Complaint.

II

Respondent admits the allegations of Paragraph III of the Complaint except insofar as it alleges that the sugar purchased by Respondent was purchased outside of the State of Florida. Respondent shows that all sugar purchased by it was raised within and purchased within the State of Florida.

32 III

For want of sufficient information Respondent can neither admit nor deny the allegations of Paragraph IV of the Complaint.

IV

Respondent denies Paragraphs V, VI, and VII of said Complaint as alleged.

V

Respondent denies the allegations of Paragraphs VII and IX.

VI

Pending receipt of further detailed information as requested in its Motion for Bill of Particulars, Respondent can only cate-

gorically deny the allegations of said Paragraphs IX and X of the Complaint as alleged. Respondent reserves the right to file further Answer to said paragraphs, if and when its Motion for Bill of Particulars is granted and response thereto furnished to Respondent.

VII

For want of sufficient information Respondent can neither admit or deny the allegations of Paragraph XI of said Complaint.

VIII

Respondent denies the allegations of Paragraph XII of said Complaint.

33

IX

Pending ruling on its Motion for Bill of Particulars and Response thereto, Respondent can only categorically deny Paragraphs XIII and XIV of said Complaint as alleged. Respondent admits that none of the persons listed in Appendix "A" of said Complaint are presently employed by it. Respondent reserves the right to file further answer to the allegations of said Paragraphs XIII and XIV, if and when its Motion for Bill of Particulars is granted and response is made thereto.

X

Respondent denies Paragraph XV if said Complaint, as alleged.

XI

Respondent denies each and every allegation of Paragraphs XVI, XVII, XVIII, XIX, and XX of the Complaint.

Wherefore, having fully answered, Respondent respectfully prays that said Complaint be dismissed.

Respectfully submitted.

[SEAL] SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.,
By SHERMAN J. TOBIN,
Secretary Treasurer.

ALBERT BERNSTEIN,
BERNSTEIN & HODSDON,
Seybold Bldg., Miami, Fla.
FRANK A. CONSTANGY,
1404 Candler Bldg., Atlanta, Ga.,
Attorneys for Respondent.

34 [*Duly sworn to by Sherman J. Tobin; jurat omitted in printing.*]

35 Before National Labor Relations Board

DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.

[Title omitted.]

Order re bill of particulars

December 13, 1949

The Respondent having filed a motion for a bill of particulars with respect to paragraphs IX, X, XIII, and XIV of the complaint in the above-entitled matter, and said motion having been referred to the undersigned as the Trial Examiner designated in said proceeding,

Now upon examination of the complaint and said motion,

It Is Hereby Ordered that the aforesaid motion is granted to the extent that the General Counsel shall furnish the attorneys for Respondent with the following information in writing on or before December 20, 1949:

(1) The specific names of the persons who engaged in the alleged illegal conduct set forth in paragraph X, subparagraphs (a), (b) and (c) of the complaint, and the approximate dates when such individuals engaged in such conduct.

36 (2) The specific names of the persons to whom each of the individuals made unconditional application for reinstatement to their former or substantially equivalent positions as set forth in paragraph XIII of the complaint, and the specific names of the persons who refused to reinstate each of the said individuals as alleged in paragraph XIV of the complaint.

In all other respects the motion for bill of particulars is denied.

Reeves R. Hilton,
(REEVES R. HILTON),
Trial Examiner.

Dated December 13, 1949.

Before National Labor Relations Board

TENTH REGION

Docket No. 10–CA–619 Official Exhibit No. GC–I–L

[Title omitted.]

Bill of particulars

January 13, 1950

Now comes William M. Pate, Counsel for the General
37 Counsel in the above-styled case, in accordance with the Order of the Trial Examiner Reeves R. Hilton dated December 13, 1949, and files this Bill of Particulars alleging as follows:

I

Charles Carnifax, route supervisor of the Respondent, engaged in the conduct set forth in Paragraph X (a) of the Complaint on or about July 25, 1948.

II

The conduct set forth in Paragraph X (b) of the Complaint was engaged in by the following officers, agents and employees of the Respondent on or about the dates listed opposite their respective names:

Sherman Tobin: September 4, 1948, September 7, 1948, September 10, 1948.

Charles M. Dismukes: September 7, 1948, September 9, 1948.

Charles Carnifax: September 4, 1948.

III

Charles Carnifax on or about August 15, 1948, engaged in the conduct set forth in Paragraph X (c) of the Complaint.

38 IV

The acts alleged in Paragraph X (a) (b) and (c) of the Complaint were authorized, instigated and acquiesced in by A. J. Tobin, President of the Respondent.

V

In accordance with Paragraph 2 of the Order of the Trial Examiner described above, the undersigned shows the following facts:

(a) On September 7, 1948, Sherman Tobin, Vice President and General Manager of the Respondent, stated to John J. Lunin and Francis J. Reilly, representatives of the Union, and Nat Freeman, T. Shannon and Walter F. Croon that the Respondent would reinstate only one or two of the striking employees.

(b) On or about September 9, 1948, Nat Freeman, T. Shannon, Walter F. Croon and Francis J. Reilly made application for reinstatement to Charles M. Dismukes, the Respondent's sales manager on behalf of all the employees whose names are set forth in Appendix A of the Complaint.

(c) On or about September 9, 1948, John J. Lunin and Francis J. Reilly made application for reinstatement to Sherman Tobin on behalf of all the employees listed in Appendix A of the Complaint.

(d) On or about September 10, 1948, Nat Freeman, Walter F. Croon, Joseph L. Klein and Francis J. Reilly made application for reinstatement to Charles M. Dismukes on behalf
39 of all the employees listed in Appendix A of the Complaint.

(e) On or about September 10, 1948, T. Shannon and James P. Yost made application for reinstatement to Charles Carnifax, route supervisor of the Respondent.

(f) On or about September 16, 1948, John J. Lunin made application for reinstatement to Sherman Tobin on behalf of all the employees listed in Appendix A of the Complaint.

(g) On or about September 25, 1948, Joseph L. Klein made application for reinstatement to Sherman Tobin.

Dated at Atlanta, Georgia, this 13th day of January, 1950.

William M. Pate,
(William M. Pate),
Counsel for the General Counsel.

40 Before National Labor Relations Board

[Title omitted.]

Motion to strike portions of Complaint

February 6, 1950

Now comes the respondent in the above matter and, through its attorney, files this its motion to strike Paragraphs VI, VII, VIII, IX, and XVI of the Complaint, and those portions of Paragraphs

XIX and XX which allege violation of Section 8 (a) (5) of the National Labor Relations Act as Amended, and for grounds thereof respondent shows:

A. That the Complaint was issued on the basis of a charge filed on February 7, 1949, and made a part of the Complaint in this matter, and that such charge does not allege violation of Section 8 (a) (5) of the Act.

B. That under the terms of Section 10 (b) of the National Labor Relations Act as amended, as of the time of the issuance of the Complaint and its allegation of refusal to bargain, more than six months had elapsed between the commission of the alleged refusal to bargain and the notification to this respondent.

41 Wherefore respondent prays that the above mentioned paragraphs of the Complaint be stricken.

Dated February 6, 1950.

SEVEN-UP BOTTLING CO.
OF MIAMI, INC.,
By ALBERT B. BERNSTEIN,
FRANK F. CONSTANGY,
Its Attorneys.

X-577

Rec. 10-9-47.
File in Form File.

Before National Labor Relations Board

TRIAL EXAMINING DIVISION

WASHINGTON, D. C.

Order designating Trial Examiner

December 13, 1949

It Is Hereby Ordered that Reeves Hilton act as Trial Examiner in the above case and perform all the duties and exercise
42 all the powers granted to trial examiners under the Rules and Regulations—Series 5, as amended of the National Labor Relations Board.

Dated, Washington, D. C., December 13, 1949.

[SEAL] (S) George Bokat,
(GEORGE BOKAT),
Acting Chief Trial Examiner.

(Affidavit and Return Receipts Omitted.)

X-564

Rev. 10-9-47

Before the National Labor Relations Board

Order designating Trial Examiner

February 7, 1950

It Is Hereby Ordered that A. Bruce Hunt act as Trial Examiner in the above case in place and stead of Reeves Hilton and perform all the duties and exercise all the powers granted to trial examiners under the Rules and Regulations—Series 5, as amended of the National Labor Relations Board.

43 Dated, Washington, D. C., February 7, 1950.

[SEAL] William R. Ringer,
(WILLIAM R. RINGER),
Chief Trial Examiner.

Before National Labor Relations Board

Frank A. Constangy.
Legare Davis.
Mildred McClelland.

LAW OFFICES

FRANK A. CONSTANGY

CANDLER BUILDING, ATLANTA 3, GEORGIA,
FEBRUARY 20, 1950.

CHIEF TRIAL EXAMINER,
National Labor Relations Board,
Washington, D. C.

Re: Case No. 10-CA-619 7-Up Bottling Company of Miami, Inc.

DEAR SIR: The Hearing in the above matter was concluded in Miami, Florida on Friday, February 10, 1950. The Trial Examiner granted the usual fifteen days within which to file Briefs. It was agreed at the Hearing that oral argument would be waived by both parties, and that Briefs would be filed instead because of the fact that the case involves several fairly complex legal issues, and substantial factual issues.

44 I am advised that the transcript will not be delivered so as to reach me until after February 25. Under the circumstances, I am respectfully requesting an extension of time to file

Briefs in this matter until March 18. I would appreciate your advising me by wire collect if this extension is granted.

Very truly yours,

Frank A. Constangy.
(FRANK A. CONSTANGY.)

FAC:kj.

cc: Mr. William Pate, Attorney for General Counsel, Mr. Albert Bernstein, Miami, Florida, Mr. A. Bruce Hunt.

45 Before National Labor Relations Board

TRIAL EXAMINER, N. L. R. B., WASHINGTON

TELEGRAM

From File _____
Bureau _____
Chg. Appropriation _____
WRR:mch.

FEBRUARY 21, 1950.

WILLIAM M. PATE, Esq.,
National Labor Relations Board,
701 Atlanta National Bldg., Atlanta, Ga.

FRANK A. CONSTANGY, Esq.
Candler Bldg., Atlanta, Ga.

ALBERT B. BERNSTEIN, Esq.
950 Seybold Bldg., Miami, Florida.

JOHN H. LUNIN,
47 NW. Third Street, Miami, Florida.

Re Seven Up Bottling Co. Of Miami, Inc., Case No. 10-CA-619: At the requet of counsel for respondent, for extension of time to file briefs, time is hereby extended to March 13, 1950.

WILLIAM R. RINGER,
Chief Trial Examiner.

(Affidavit and Return Receipts Omitted.)

46 N. L. R. B. 1405

(4-22-48)

Before National Labor Relations Board

[Title omitted.]

Order transferring case to the National Labor Relations Board

September 28, 1950

A hearing in the above-entitled case having been held before a duly designated Trial Examiner and the Intermediate Report and Recommended Order of the said Trial Examiner, a copy of which is annexed hereto, having been filed with the Board in Washington, D. C.

It Is Hereby Ordered, pursuant to Section 203.45 of National Labor Relations Board Rules and Regulations, Series 5, that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C. September 28, 1950.

By direction of the Board:

Frank M. Kleiler,
(FRANK M. KLEILER),
Executive Secretary.

47 NOTE.—Communications concerning compliance with the Intermediate Report should be with the Director of the Regional Office issuing the complaint.

Your attention is specifically directed to the concluding paragraph of the Intermediate Report in respect to your right to file exceptions, briefs, and to request oral argument. Please note that exceptions and brief must be filed as separate documents.

Before National Labor Relations Board

Frank A. Constangy, Legare Davis (1950), Mildred McClelland, Marion A. Prowell.

LAW OFFICES
FRANK A. CONSTANGY
CANDLER BUILDING, ATLANTA 3, GEORGIA,
October 9, 1950.

Mr. FRANK M. KLEILER,
National Labor Relations Board,
Washington, D. C.

Re: Case No. 10-CA-619 Seven Up Bottling Company of Miami, Inc.

DEAR MR. KLEILER: In accordance with Section 203.46 of the Rules and Regulations of the National Labor Relations Board, the undersigned, as Counsel for the Respondent, does hereby request permission to argue orally before the Labor Board in con-
48 nection with the Exceptions which will hereinafter be filed on behalf of the Respondent in the above matter.

Please acknowledge receipt of this letter.

Very truly yours,

Frank A. Constangy,
(FRANK A. CONSTANGY),
Of Counsel,
Seven-Up Bottling Co. of Miami.

FAC:kj.

cc: Mr. Albert Bernstein, Mr. Wm. Pate, Chief Legal Officer, N. L. R. B., Atlanta, Ga.

Before National Labor Relations Board

WESTERN UNION

(16)

1950 Oct 17 P. M. 3

WZ 112 PD—RN Atlanta GA 17 248P—

Frank Kleiler—
National Labor Relations Board—

Re Case No 10-CA-619 Seven-Up Bottling Co. of Miami. respondent respectfully requests an extension of time until November 7 to file brief in support of exceptions in above matter due on or about October 22. Please advise by wire collect—

Frank A. Constangy 1404 Candler Bldg—

10-CA-619 7 22 1404—

49 Before National Labor Relations Board

File

National Labor Relations Board

N. L. R. B.

CMM: VLN

October 17, 1950.

Frank A. Constangy, Esquire,
1404 Candler Building, Atlanta, Georgia.

Bernstein & Hodsdon,
Att: Albert R. Bernstein, Esquire.
950 Seybold Building, Miami, Florida.

Mr. John J. Lunin,
47 NW. Third Street, Miami, Florida.

John C. Getreu,
Regional Director,
50 Whitehall Street, Atlanta 3, Georgia.

Re: Seven-Up Bottling Company of Miami, Inc., Case No. 10-CA-619. Time for filing briefs is extended to November 7, 1950. Exceptions are due in Washington on or before October 23, 1950.

National Labor Relations Board.

50 October 18, 1950

Before National Labor Relations Board

Exceptions to intermediate report of the Trial Examiner

Now Comes the Respondent in the above matter and files these, its Exceptions to the Intermediate Repore of Trial Examiner A. Bruce Hunt, dated September 28, 1950, and served upon the Respondent on October 2, 1950.

I.

Respondent excepts to that portion of Footnote 2, pages 2 and 3 the Intermediate Report, as contrary to the evidence in that the Trial Examiner incorrectly found that the Charge and Complaint contained an allegation of refusal to bargain; and Respondent excepts to the Trial Examiner's failure to find that the six month period provided in Section 10 (b) of the Act had expired without issuance of Charge or Complaint under Section 8 (a) (5).

Respondent further excepts to the finding of the Trial Examiner in Footnote 2 on Amended Charges and Complaint, as contrary to law, and excepts to the finding that an issue may
51 be litigated without proper allegation in Charge and Complaint, as contrary to law.

Respondent excepts to the finding by the Trial Examiner in Footnote 2 that any allegation of violation of Section 8 (a) (1) inherently contains an allegation of violation of Section 8 (a) (5), as contrary to law.

II

Respondent excepts to the failure of the Trial Examiner to make a complete finding of facts in Lines 21–32 on page 4 of the Intermediate Report, and excepts to lines 29–30, as being contrary to the evidence.

III

Respondent excepts to Line 41 on page 4 of the Intermediate Report, as being contrary to the evidence.

IV

Respondent excepts to the failure of the Trial Examiner to make a complete finding of facts in lines 43–60 on page 4 of the Intermediate Report.

V

Respondent excepts to the finding in line 1 on page 5 of the Intermediate Report that the Union representative again wrote to Sherman Tobin, as being contrary to the evidence, in that the first letter was not directed to Sherman Tobin.

52 VI

Respondent excepts to the finding beginning with Line 9 through line 54, including Footnote 4, on page 5, continued on line 31, page 6, and ending at line 43 on page 6 of the Intermediate Report as an incomplete statement of the evidence, and as being in part contrary to the evidence, and containing unwarranted assumptions and inferences contrary to law, in that:

(a) In finding that the Union Representative was not advised of the absence of Mr. Tobin, Sr., the Trial Examiner ignores the change of addressee in the letter addressed to Respondent by the Union, and ignores the undisputed admissions in the Record. The Trial Examiner failed to recognize the true significance of the Union Representative's denial of knowledge of the limited authority of Sherman Tobin, and to make appropriate findings thereon.

(b) The Trial Examiner's finding of Sherman Tobin's complete authority is not based on the evidence, but assumed by his alleged relationship with employees which is identical with the relationship of any, even minor, supervisor with his employees.

(c) In finding that the Union Representative offered proof of representation, the Examiner credits an unsupported statement at variance with other testimony to the contrary credited by the Examiner, the clear evidence being that the Union representative was well aware that he did not represent a majority at the time of his demand. Such finding is also inconsistent with the testimony of otherwise credited witnesses.

53 (d) The Examiner's finding is contrary to law in that it is predicated on the illegal theory that a Union is entitled to determine who shall speak for an employer.

(e) The Union, not the Respondent, rejected a determination by election, contrary to the Trial Examiner's finding, and the period of demand for recognition prior to the strike covered the short period of seven days or less.

VII

Respondent excepts to lines 1–10 on page 6, and Footnote 5, lines 43–46 on page 6 of the Intermediate Report as contrary to the evidence and as an unwarranted inference not supported by the evidence.

VIII

Respondent excepts to the findings in Footnote 6, lines 46–58, page 6 and line 11 on page 6 to line 20 on page 7 of the Intermediate Report as incomplete statements of the evidence which if given in full would discredit the testimony of witnesses for the General Counsel and warrant a different finding than that of the Trial Examiner.

IX

Respondent excepts to the incomplete finding of fact and the failure to review all the testimony concerning the meeting immediately preceding the strike, in lines 33–60 on page 7 of the Intermediate Report, as being contrary to law in that it infers

54 that Sherman Tobin was obligated to request proof of union majority status, as a condition of declining recognition.

X

Respondent excepts in Footnote 8 on page 7 of the Intermediate Report, to the Trial Examiner's failure to make findings and cite the conflicting testimony by witnesses for the General Counsel as

to the meeting preceding the strike; said testimony being of such a nature as to require a different finding. Respondent excepts to the illogical and unwarranted inference that appearance at a meeting inevitably follows appointment to a negotiating committee, contained therein.

XI

Respondent excepts to the findings in line 20 on page 7, continued on lines 1–35 on page 8, continued on lines 1–2, footnotes 10 and 11 on page 9, and footnote 9 on page 8 of the Intermediate Report in that the conclusion of a hostile attitude by Sherman Tobin is contrary to the facts, and without support in the Record; is based on statements of witnesses whose testimony could not and should not be credited.

XII

Respondent excepts to that part of lines 1–12 on page 10 and footnote 13 on page 10 of the Intermediate Report in that the finding or remarks made to Shannon is admittedly based on hearsay testimony, is denied in the Record, and is inconsistent with the finding in lines 14–22, on page 10 of the Intermediate Report, and with clear evidence in the Record that strikers were given an opportunity to request reinstatement and those who requested it were reinstated.

XIII

Respondent excepts to the failure to find in lines 14–22 on page 10 of the Intermediate Report, that other strikers who applied on other occasions were reinstated.

XIV

Respondent excepts to the finding in lines 42–44 on page 10, line 1, page 11, footnote 14 and footnote 16 on page 11 of the Intermediate Report, that Sherman Tobin opposed the petition for election at the meeting of September 27, as contrary to the facts and an improper conclusion in the light of statement by Respondent's Counsel that the status of drivers as employees or contractors while in a majority issue was not waived by the Company at the conference with the Union.

XV

Respondent excepts in lines 21–32, page 11 of the Intermediate Report to the Trial Examiner's failure to find that the withdrawal of the Petition was an admission of lack of majority status by the Union inasmuch as strikers could have voted subject to challenge.

56

XVI

Respondent excepts to the finding in lines 11 and 12 on page 12 of the Intermediate Report that Respondent's position on the appropriate unit is basically inconsistent with the Union's original petition. The Examiner's conclusion rests on findings of variations in numbers employed as drivers or plant help and not on the position of Respondent that drivers separately do not constitute an appropriate unit, and such was the original contention of the Union. Respondent further excepts to the findings in Footnote 20 on page 13 of the Intermediate Report on the number of employees in different categories, insofar as they are inconsistent with the Record and constitute arbitrary classifications of jobs contrary to the evidence.

XVII

Respondent excepts to the findings of an appropriate unit of drivers in lines 1–25 on page 13, as contrary to law. Respondent further excepts to the findings of separation of interests of drivers and their separation in the petition, in the demand, and in the organizational activities from those of the other employees, as contrary to evidence.

XVIII

Respondent excepts to Lines 1–23 on page 14, continued on line 1 through line 2, on page 15, footnotes 22, 23, 24, 25, and 26 on page 14 of the Intermediate Report, as incomplete findings of dates of Union membership, prejudicial to the Respondent,
57 relying in part on material submitted through a witness discredited by the Examiner, and leading to a conclusion of majority representation, not supported by the Record on the valid evidence therein.

XIX

Respondent excepts to the finding in lines 4–19 on page 15 of the Intermediate Report on majority status of the Union as contrary to the facts on Union membership on August 18 among driver-salesmen. Respondent further excepts to the conclusions and citations in footnote 27, page 15, as inapplicable in the present case.

XX

Respondent excepts to the finding in lines 20 through 45 on page 15 of the Intermediate Report, to wit: his finding that Respondent did not question the Union's majority status in good faith, is contrary to the testimony and contrary to the facts in that the Union did not have a majority status. The Trial Exam-

iner's report of the testimony by Dismukes and Sherman Tobin is inaccurate, reported out of context, and contrary to the testimony in that Sherman Tobin did not reject the demand for recognition, but requested that it be submitted to the proper corporate authority. The findings on opposition to organization are without support, and there is no valid evidence to support such a finding.

XXI

Respondent excepts to the failure of the Trial Examiner in lines 1–8 on page 16 to report, and in footnotes 28, 29, and 30 on
58 page 16 of the Intermediate Report, to give a complete description and proper evaluation of the Record of witnesses who testified regarding alleged meetings and requests for reinstatement. The partial findings are prejudicial to Respondent; inconsistent with the whole testimony; and contain an unjustified conclusion that reinstatement was denied and the strike prolonged thereby.

XXII

Respondent excepts to the finding of the Trial Examiner contained on page 17, beginning at line 1 and ending on line 14 of the Intermediate Report as being contrary to the evidence and contrary to law. Respondent excepts to the entire section of the Intermediate Report headed "IV," as being contrary to the evidence and contrary to law. Respondent excepts to each and every paragraph of Section V of the Intermediate Report on pages 17–19, entitled "The Remedy" and entitled "Conclusions of Law" as being contrary to the evidence, unsupported by substantial evidence in the Record as a whole, and contrary to law. Respondent excepts to each and every recommendation of the Trial Examiner beginning on page 19 and ending on page 20 of the Intermediate Report.

XXIII

Respondent expressly excepts to the failure of the Trial Examiner to find that upon consideration of the testimony in the Record as a whole that Respondent did not violate Sections 8 (a) (1), 8 (a) (3), 8 (a) (5) of the National Labor Relations Act, as amended. Respondent expressly excepts to the Trial Examiner's finding that a refusal to accept and act upon a Union's
59 request for recognition by a corporate officer who had no authority to so act constitutes a violation of Section 8 (a) (5) of the National Labor Relations Act, as amended; and to the Trial Examiner's further concept that an employer is obligated, at the peril of being found in violation of Section 8 (a) (5) of

the Act, to extend recognition to a Union immediately upon request of its agent, even though there is a substantial question as to the appropriateness of the unit, and even the identity of the unit, for which such request for recognition is made, as being contrary to law.

Respectfuly submitted.

SEVEN-UP BOTTLING COMPANY
OF MIAMI, INC.,
By ALBERT BERNSTEIN,
FRANK A. CONSTANGY,
Its Attorneys

ALBERT BERNSTEIN,
BERNSTEIN & HODSDON,
Seybold Bldg., Miami, Florida.

FRANK A. CONSTANGY,
1404 Candler Building, Atlanta, Georgia,
Attorneys for Respondent.

OCTOBER 18, 1950.

60 Before National Labor Relations Board

Exceptions to intermediate report

October 20, 1950

[Title omitted.]

Now Comes the undersigned Counsel for the General Counsel in the above-styled matter and files the following Exceptions to the Intermediate Report of Trial Examiner A. Bruce Hunt, dated September 28, 1950.

1

Exception is taken to the failure of the Trial Examiner to find that the respondent's exclusive franchise to bottle and sell a beverage known as "7-Up" in Miami, Florida, and the nearby area, was obtained by the respondent under an arrangement with Seven Up Company, located at St. Louis, Missouri (Intermediate Report 4, lines 17, 18).

2

Exception is taken to the failure of the Trial Examiner to find that all syrup used by the respondent in the manufacture of 7-Up
61 is, and has been at all times material herein, purchased by the respondent from Seven Up Company of St. Louis, Mis-

souri, and shipped from St. Louis, Missouri, by Seven Up Company to the respondent at Miami, Florida.

3

Exception is taken to the failure of the Trial Examiner to find that 7-Up is advertised by Seven Up Company of St. Louis, Missouri, in magazines on a nation-wide basis.

4

Exception is taken to the failure of the Trial Examiner to find that the cost of national advertising by Seven Up Company of St. Louis, Missouri, is added to the price of the syrup paid by the respondent and other distributors of 7-Up.

Respectfully submitted, October 20, 1950.

William M. Pate,
(WILLIAM M. PATE),
Counsel for the General Counsel.

National Labor Relations Board, Atlanta National Building, Atlanta, Georgia.

62 Before National Labor Relations Board

Charging parties' response to employer's exceptions to intermediate report to the Trial Examiner

[Title omitted.]

Now comes International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., Local Union No. 390 (hereinafter referred to as the Union) and files this its response to the exceptions filed by the employer, Seven-Up Bottling Company of Miami, Inc. to the Intermediate Report of the Trial Examiner, and respectfully shows:

1

Exception I is without foundation in law or fact for that the Trial Examiner's report contains findings supported by competent and substantial evidence that both the charges and complaint issued in the case sufficiently state grounds substantiating violations of Section 8 (a) (5) of the Act and that such charge and complaint were issued within the Statute of Limitations provided by law. It is academic that a charge and complaint designated as being predicated upon Section 8 (a) (1) of the Act
63 contains a substantial allegation of violation of Section 8

(a) (5), particularly where the charge and complaint show on their face that a refusal to bargain is charged.

2

Exception II is without basis in law or fact for that the Intermediate Report clearly shows that the findings of fact complained of therein are full and complete and are consistent with the weight of the evidence.

3

Exception III is without basis in law or in fact and is consistent with the evidence and supported by the weight of the evidence, the said finding complained of being amplified in the later findings of the Trial Examiner.

4

The Union responds to Exception IV in the same manner as to Exception III.

5

The finding complained of in Exception V is demanded by the evidence.

6

It is obvious from the Trial Examiner's report that all of the matters and things complained of in Exception VI where
64 supported by evidence were considered by the Trial Examiner in his findings and recommendations. All of the enumerated exceptions under said Exception VI are based upon misconstructions of the evidence as well as upon erroneous principles of law. The Union contends that the Trial Examiner's findings complained of are supported by substantial evidence and required by the evidence. However, the Union respectfully points out that the findings respecting the authority of Sherman Tobin are not essential to the conclusion that the employer violated Section 8 (a) (5) and the other sections of the Act involved. The Trial Examiner has found correctly that the evidence conclusively shows that Sherman Tobin had authority, at least to the extent of binding his principal, if any, by his acts as respects the unfair labor practices committed. If the said Sherman Tobin was without authority, which the evidence clearly belies, the person having final authority certainly was bound by the notices received by his agent and himself, failed and refused to bargain, there being nothing in the evidence to indicate any other person ever undertook to bargain with the Union.

7

Respondent's Exception VII is without merit, the findings and the basis for such findings complained of being supported by substantial evidence and the great weight of the evidence as is clearly demonstrated in the Intermediate Report.

8

The exceptions noted in Exception VIII are without
65 merit for that the findings complained of are supported by the weight of the evidence and the statements in support of such findings clearly show that the Trial Examiner properly weighed and determined the credibility of the witnesses for the respective parties.

9

Exception IX is without merit in that the portion of the Trial Examiner's report complained of is supported by the evidence and by law and contains no such inference as that noted in the Exception, the evidence clearly demonstrating that the Union made an unequivocal offer to show proof of its majority representation.

10

Exception X is without merit in that the matters and things complained of therein are supported by the evidence and are treated with sufficiency in the findings of fact in the Intermediate Report.

11

The findings complained of in Exception XI are consistent with the great weight of the evidence as is clearly demonstrated by the footnotes to the Intermediate Report explaining the reasons for such findings.

12

Exception XII is without merit for that the finding of fact and reasons for such finding are based upon substantial evidence, none of which is hearsay testimony as complained of in the Exception.

66 13

Exception XIII is without merit in that the absence of a finding of fact that other strikers who applied on other occasions were reinstated is irrelevant and immaterial to the matters and things before the Trial Examiner, the findings of fact on said Page 10 of

the Intermediate Report clearly demonstrating that an unfair labor practice had been committed as respects the persons for whom the unfair labor practice charges had been filed.

14

The findings complained of in Exception XIV are supported by substantial evidence and by the law and are therefore without merit.

15

Exception XV is without merit for that the Trial Examiner was under no duty or obligation to make a finding of no probative value and one which would necessarily be a conclusion of law unsupported by evidence.

16

Exception XVI is without merit in that taking the findings of fact as a whole such findings are required by the evidence and the unit sought by petitioner is consistent with law, custom and practice and precedence established by this Board.

67

17

Exception XVII is without merit for that the findings of the Trial Examiner were required by the evidence and by the applicable decisions of this Board.

18

Exception XVIII is without merit for that the findings of the Trial Examiner were required by the evidence and by the applicable decisions of this Board.

19

Exception XIX is without merit for that the findings of the Trial Examiner were required by the evidence and by the applicable decisions of this Board.

20

Exception XX is without merit for that the findings complained of are supported and required by the evidence, the said evidence being conclusive that the Union did have a majority status at the times involved, that the employer opposed organization, and that the employer rejected the demand for recognition.

21

Exception XXI is without merit for that those portions of the Intermediate Report together with other portions thereof give a sufficient description and evaluation of the record justi-
68 fying and requiring the findings and conclusions reached by the Trial Examiner. The alleged partial findings complained of are adequate and prejudice the respondent to the extent that the weight of the evidence prejudices the respondent, the same findings being consistent with the evidence as a whole and requiring the conclusions reached by the Trial Examiner.

22

Respondent's Exception XXII is wholly without merit, the findings of the Trial Examiner contained in Sections IV and V being consistent with the evidence and required by the evidence and by law. Likewise, that portion of the Exception which relates to the Trial Examiner's recommendations is without merit for that the recommendations are required by the evidence and by law and supported by findings of fact in the Intermediate Report likewise required by the evidence and by law. Insofar as the findings complained of in Exception XXII are concerned as respects interstate commerce, the Union (the charing party herein) adopts the Exceptions to the Intermediate Report filed by the Counsel for the General Counsel in this case and respectfully urge that such exceptions are well taken in that precedent requires a finding of interstate commerce upon the basis of the facts set forth in the said exceptions as well as upon the findings of the Trial Examiner.

23

Exception XXIII is without merit for that the evidence and the law required the findings of the Trial Examiner that the
69 respondent had violated Section 8 (a) (1), 8 (a) (3) and 8 (a) (5) of the National Labor Relations Act as Amended.

Respectfully submitted.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, A. F. OF L., LOCAL UNION NO. 390,

By Warren E. Hall, Jr.,
(WARREN E. HALL, Jr.),
Its Attorney.

P. O. Address: 1202 Candler Building, Atlanta 3, Georgia.

70 *Certificate of service (omitted in printing).*

D–4613 Miami, Fla.

Before National Labor Relations Board

71 *Decision and order*

January 26, 1951

[Title omitted.]

On September 28, 1950, Trial Examiner A. Bruce Hunt issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs. The Respondent's request for oral argument is denied, as the record and briefs, in our opinion, adequately present the issues and the positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings,

72 conclusions, and recommendations of the Trial Examiner, with the following additions and modifications:[2]

1. The Respondent, a Florida corporation, bottles, sells, and distributes a nationally advertised drink, known as "7-Up," in Miami and its environs. It operates under a direct franchise granted by the Seven-up Company of St. Louis, Missouri, an agreement which gives the Respondent the exclusive right to make and distribute "7-Up" in three Florida counties. All syrup or extract—the "essence" of the drink—is received from the St. Louis company, which also advertises "7-Up" in national magazines. The cost of this national advertising is included in the price paid by the Respondent for the syrup or extract. During the year 1949, the Respondent's purchases totaled $145,000; of this amount $20,000 was for syrup from St. Louis, and approximately $62,000 for other materials, such as bottles, crowns, advertising and refrigeration materials, and machinery parts, shipped to the Respondent from points outside of the State of Florida. All the Respondent's sales are made within the State of Florida. The Respondent contends that its operations are essentially local

[2] For the reasons set forth in Cathey Lumber Company, 86 N. L. R. B. 157, we find, contrary to the Respondent, and in accord with the Trial Examiner, that the Section 8 (5) (5) allegation in the complaint was not barred by Section 10 (b) of the Act. However, we find it unnecessary to adopt the Trial Examiner's further reasoning with respect to his Section 10 (b) finding.

in character, and it would not effectuate the policies of the Act for the Board to exercise its jurisdiction in this case.

The Board has recently reexamined its policies concerning the exercise of jurisdiction, and has concluded that the Board should exercise its discretion in favor of taking jurisdiction when an employer's operations, though local in character, form an
73 integral part of a multistate enterprise.[3] We view the Respondent as carrying on such operations in the soft drink bottling industry. In reaching this conclusion, we have considered the franchise arrangement under which the Respondent operates, and the fact that it purchases all its "7-Up" syrup from the St. Louis company, and that it contributes to the cost of national advertising for its product. From these facts and the record as a whole, we conclude that it operates as an essential link and element in a multistate system devoted to the manufacture and distribution of a nationally advertised drink, "7-Up." Accordingly, we find that it will effectuate the policies of the Act to assert jurisdiction over the Respondent.[4]

2. We agree with the Trial Examiner's conclusion that the Respondent unlawfully refused to bargain with the Union. In support of its exceptions to this finding, the Respondent argues that the record does not establish the Union's majority status at the time of the refusal to bargain. It points particularly to the fact that Freeman's testimony as to the dates when he and others joined the Union was unreliable and discredited by the Trial Examiner, and that Shannon did not transfer his membership in the Teamsters from the Cincinnati local to the Miami local until October 3, 1948, after the Union had abandoned the strike. Whatever doubt, if any, these facts may cast upon the Union's majority status before the strike, it is clear, and we find as did the Trial Examiner, that on September 7, 1948, when all but two of the driver-salesmen and driver-salesmen trainees struck for recognition and picketed the Respondent's properties in support of their strike, the Union represented a majority of the em-
74 ployees in the appropriate unit. In these circumstances, we find it unnecessary to decide whether or not the Union previously represented a majority. We find that on September 7, 1948, and thereafter, the Respondent unlawfully refused to bargain with the Union and thereby violated Section 8 (a) (5) and 8 (a) (1) of the Act.

3. We further agree with the Trial Examiner's conclusion that the Respondent discriminatorily refused to reinstate the strikers when they offered to return to work shortly before the Union

[3] See the Borden Company, Southern Division, 91 N. L. R. B. No. 109.
[4] Baxter Bros., 91 N. L. R. B. No. 233; see also Mexico Coca-Cola Bottling Company, 88 N. L. R. B. No. 82, and State Beverage Distributors No. 4, Inc., 88 N. L. R. B. No. 20.

abandoned its picketing activities. As set forth in the Intermediate Report, the striking employees, through their spokesmen, asked Sherman Tobin "if he wouldn't put the men back to work and let things go through normal channels—let the [National] Labor Relations Board take care of things and the men go back to work in the meantime." Tobin refused. We do not view the proposal that the Respondent await the outcome of the Board proceedings as imposing a condition upon the offer to return to work. All that the Union sought was a return to the status quo preceding the strike.

Even assuming, however, that the request to await settlement of the dispute through normal Board process can be described as a "condition" upon the offer to return, we believe that it constituted no more than an expression of the Union's right to resort to the Board, with or without the Respondent's consent. In any event, the employees' proposal to return contained nothing that could justify the Respondent's denial of their right to reinstatement upon abandonment of the concerted strike action.[5] This request
for reinstatement, made on or about September 16, 1948,
75 was the last offer made on behalf of the strikers before abandonment of the picketing. Regardless of any other position that the union representatives may have taken respecting reinstatement in the course of the strike, we are satisfied on the record as a whole, as was the Trial Examiner, that this was the only offer to return made at the end of the strike. As the Respondent rejected their unqualified offer, we find that it discriminated against the strikers in violation of Section 8 (a) (3) and 8 (a) (1) of the Act.

Order

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Seven Up Bottling Company of Miami, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, as the exclusive representative of the Respondent's driver-salesmen and trainee driver-salesmen;

(b) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, or in any other labor organization

[5] See Black Diamond S. S. Corp. v. N. L. R. B., 94 F. 2d 875 (C. A. 2), cert. den. 304 U. S. 579.

of its employees, by refusing to reinstate any of its employees because of their union membership or activity or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of employment;

76 (c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Offer to the employees named in Appendix A, attached to the Intermediate Report, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner set forth in the section of the Intermediate Report entitled "The Remedy";

(c) Make whole the employees whose names are set forth

77 in Appendix A, attached to the Intermediate Report, in the manner set forth in the section of the Intermediate Report entitled "The remedy," for any loss of pay each may have suffered as a result of the Respondent's discrimination against them on September 16, 1948;

(d) Upon request, make available to the National Labor Relations Board, or its agent, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary for a determination of the amount of back pay due and the right of reinstatement under the terms of this Order;

(e) Post at both its plant and office in Miami, Florida, copies of the notice attached to the Intermediate Report marked Ap-

pendix B.[6] Copies of the notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent, immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(f) Notify the Regional Director for the Tenth Region in writing, within ten (10) days from the date of this Decision and Order, what steps the Respondent has taken to comply herewith.

78 Signed at Washington, D. C., January 26, 1951.

[SEAL] PAUL M. HERZOG,
Chairman,
JOHN H. HOUSTON
Member,
JAMES J. REYNOLDS, Jr.,
Member,
National Labor Relations Board.

Before National Labor Relations Board

DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.

[Title omitted.]

Intermediate report and recommended order

September 28, 1950

William M. Pate, Esq., for the General Counsel.

Frank A. Constangy, Esq., of Atlanta, Ga., and Bernstein & Hodsdon, by Albert B. Bernstein, Esq., of Miami, Fla., for the Respondent.

Mr. John J. Lunin, of Miami, Fla., for the Union.

79 STATEMENT OF THE CASE

Upon a charge duly filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, herein called the Union, the Gen-

[6] This notice, however, shall be, and it hereby is, amended by striking from line 3 thereof the words "The Recommendations of a Trial Examiner" and substituting in lieu thereof the words "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

eral Counsel for the National Labor Relations Board,[1] by the Regional Director for the Tenth Region (Atlanta, Georgia), issued a complaint dated November 15, 1949, against Seven-Up Bottling Company of Miami, Inc., herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the complaint and notice of hearing thereon were duly served upon the Respondent and the Union, and a copy of the charge was duly served upon the Respondent.

With respect to the unfair labor practices, the complaint alleged in substance that: (1) On or about August 17, 1948, and at all times thereafter, the Respondent refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, although a majority of said employees had designated the Union as their representative for such purposes; (2) on or about August 11, 1948, and thereafter, the Respondent (a) interrogated its employees concerning their union affiliation and activities, (b) threatened and warned its employees to refrain from assisting, becoming members of, or remaining members of, the Union, and (c) offered its employees wage increases and other benefits on condition that they refrain from assisting, becoming members of, or remaining members of, the Union; (3) as a consequence of said conduct by the Respondent, on September 7, 1948, its employees ceased work concertedly and went on strike; and (4) about September 7, 1948, and at various dates thereafter, the Respondent refused, and has continuously refused, to reinstate certain employees for the reason that they had joined and assisted the Union and had engaged in the strike aforementioned.

On November 29, 1949, the Respondent filed a motion for a bill of particulars, which was referred by the Regional Director to a Trial Examiner for ruling. On December 13, Reeves R. Hilton, the Trial Examiner designated by the Chief Trial Examiner to rule upon the motion, granted it in part. On December 14, in advance of receipt of Trial Examiner Hilton's ruling, the Respondent filed its answer, admitting certain allegations of the complaint concerning its corporate structure and business activities, but denying that it had engaged in unfair labor practices.

Pursuant to notice, a hearing was held at Miami, Florida, from February 7 to 10, 1950, inclusive, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The

[1] The General Counsel and the attorney representing him at the hearing are referred to as the General Counsel. The National Labor Relations Board is refered to as the Board.

General Counsel and the Respondent were represented by counsel, and the Union by representative, and all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the opening of the hearing, the Respondent moved for the sequestration of witnesses, and this motion was granted. The Respondent also moved to strike certain allegations of the complaint dealing with the refusal to bargain collectively, upon grounds set forth below. This motion was denied, with leave to renew at the close of the hearing. At
81 the close of the General Counsel's case, the Respondent renewed its motion that said allegations be stricken, and the motion again was denied. The Respondent also renewed a motion, made initially during the testimony of Louis M. Baruch, a witness for the General Counsel, that Baruch's testimony be stricken. This motion too was denied. The Respondent also moved to strike certain portions of the bill of particulars and the complaint, and these motions were granted in part. At the close of the hearing, the General Counsel moved to conform the pleadings to the proof as to minor matters, and this motion was granted. The Respondent renewed its motions to strike the testimony of Baruch, the allegations concerning the refusal to bargain, and certain portions of the bill of particulars and the complaint, and these motions were taken under advisement. The parties did not argue orally at the close of the hearing, but pursuant to leave granted the Respondent filed a brief.

The Respondent's motions, made at the close of the hearing, are disposed of in accordance with the rulings and determinations below. The ground in support of the motion to strike the testimony of Baruch is set forth in the discussion of that testimony. See footnote 11. The motion to strike the allegations concerning the refusal to bargain is discussed in the footnote.[8]

---

[8] The charge was filed on February 7, 1949, and was served upon the Respondent on February 11, 1949, within 6 months after the unfair labor practices discussed below. In that portion of the charge wherein are recited the numerical sections of the Act alleged to have been violated, the allegation reads "Section 8 (a), subsections (1) and (3)," without specific reference to subsection (5). The Respondent asserts that the charge does not allege a violation of Section 8 (a) (5) and that the complainant's allegation of such violation "was barred by the six-months Statute of Limitations contained in Section 10 (b) of the Act * * *." The pertinent portion of the charge reads as follows:

On or about September 7, 1948, eight driver-salesmen employed for the above company were forced to strike because of the firm's refusal to recognize them as Union members. On several occasions between the 7th and the 14th of September these men offered their services to return to work pending the findings of the N. L. R. B. and the company flatly refused to reemploy any of these men because of their Union affiliation.

The Respondent's contention must be rejected for each of the following reasons. First, as the Board said in Tennessee Knitting Mills, 88 N. L. R. B. No. 194, "* * * we conclude that we may base an unfair labor practice finding upon any conduct which occurred within a 6-month period before the filing of a charge asserting that the Act has been violated although the charge does not specifically set forth such conduct, provided the complaint which issues pursuant to the charge alleges the conduct as an unfair labor practice * * *." See also Globe Wireless, Ltd., 88 N. L. R. B. No. 211. Second, although the charge does not refer numerically to subsection (5) of Section 8 (a), it specifically alleges that the employees struck as a consequence of the Respondent's refusal to recognize them "as Union members," and

82 Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of fact

I. The Business of the Respondent

The Respondent, a Florida corporation, has its office and place of business in Miami, Florida, where it is engaged in bottling, selling, and distributing a beverage known as "7-Up." During the year 1949, the Respondent purchased materials, including bottles, crowns, syrup, advertising and refrigeration materials, and machinery parts, valued in excess of $145,000, approximately
83 $82,000 of which were shipped to the Respondent from points outside the State of Florida.

During the same year, the Respondent's sales were valued in excess of $300,000, all of which were made within the State of Florida. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local Union No. 390, is a labor organization admitting to membership employees of the Respondent.

III. The Unfair Labor Practices

A. CHRONOLOGY OF EVENTS

The Respondent has an exclusive franchise to bottle and sell 7-Up in Miami and the nearby area. The product is distributed by salesmen who drive delivery trucks and who work on a commission basis, as more fully described below. About July, 1948, the Respondent made certain changes in the routes covered by its driver-salesmen. As a consequence the weekly earnings of some driver-salesmen fell below $50. Charles H. Carnifax, a super-

---

I believe that a reasonable interpretation of this language is that the Respondent had refused to bargain with the Union. I hold, therefore, that the charge alleges a refusal to bargain. Third, the charge does refer numerically to subsection (1) of Section 8 (a) as having been violated, and the Board has held repeatedly that an employer's refusal to bargain is a violation of Section 8 (a) (1). Moreover, it is explicitly said in May Department Stores Co. v. N. L. R. B., 326 U. S. 376, 383, 384, 66 S. Ct. 203, 208, that: "It is settled law that the Labor Relations Act makes it an employer's duty to bargain collectively only with the duly recognized or accredited representative of the employees. Disregard of this duty violates Section 8 (1) of the Act * * *. Any other conclusion would infringe an essential principle of collective bargaining." Cf. the analogous situation in N. L. R. B. v. Phoenix Mutual Life Ins. Co., 167 F. 2d 983, cert. den. 335 U. S. 845, 69 S. Ct. 68, where the Court held that the discharge of employees because of their lawful concerted activities was in violation of Section 8 (1) of the Act before its amendment, a violation of Section 8 (3) not having been alleged.

visory employee who was a witness for the Respondent, testified that dissatisfaction resulted. Carnifax testified also that two driver-salesmen, Nat Freeman and Joseph L. Klein, "really were instrumental in wanting" a guaranteed weekly income of $50, and it is clear that about early August, Freeman contacted the Union and commenced organizational activity among the driver-salesmen. Union meetings were held and a number of applications for membership were received.

84 On August 19, 1948, John L. Lunin, secretary-treasurer and business manager of the Union, wrote to the Respondent, saying that a majority of the driver-salesmen had designated the Union to represent them in collective bargaining and asking for a conference. The Respondent did not reply in writing to this communication, and a few days later Lunin called upon Sherman Tobin, the Respondent's secretary-treasurer, in the latter's office. The details of their conversation on this occasion will be discussed below in connection with a conversation on a latter occasion when Lunin again called upon Tobin, and it suffices now to state that Tobin refused to recognize the Union.

Subsequent to August 19, another union meeting of the driver-salesmen was held at which the employees elected a shop steward and a negotiating committee.[2] The date of this meeting is uncertain, but it appears to have been conducted on Sunday, August 29. Supervisor Carnifax, who did not attend the meetings, nevertheless was aware of some of them and he testified that a meeting was held on that day and that it was "usual" for meetings to be held on Sundays.

On August 30, Lunin again wrote to Sherman Tobin, claiming to have been authorized by the driver-salesmen to represent them and renewing his request for a bargaining conference. There was no written response to this letter, and within a few days

85 Lunin again called upon Tobin in the latter's office. Before reciting the details of this and the preceding conversation, it is necessary to relate certain matters concerning the Respondent's corporate set-up.

Prior to April 1, 1948, the business had been operated as an individual enterprise by A. J. Tobin, the father of Sherman Tobin. On that day, the business was incorporated with Mr. and Mrs. A. J. Tobin becoming the president and vice-president, respectively, and Sherman Tobin becoming secretary-treasurer.

---

[2] There is some disagreement among witnesses for the General Counsel concerning the identity of members of the negotiating committee. Those witnesses were in agreement that Freeman and two other driver-salesmen, Theodor Shannon and Walter Croon, were members, and the disagreement is in the recollection of some witnesses that Klein also was a member. Supervisor Carnifax testified that Klein was the "original ring leader" in the employees' activity, and it is reasonable to conclude that Klein was identified by the employees as active in the organizational efforts. But Klein testified, and I find, that he was not elected to membership on the negotiating committee.

These three individuals are the sole directors and all the corporate stock is owned by them, with one-fourth thereof belonging to Sherman Tobin. It is the Respondent's position that only A. J. Tobin was empowered to pass upon the Union's requests for recognition, and that both A. J. Tobin and his wife, Rebecca, were out of the State at the times of the requests. Neither A. J. Tobin nor Rebecca Tobin was a witness, but Sherman Tobin testified that during early August his parents went to New York in order that his father might obtain medical treatment and that they returned to Miami during late September. Sherman Tobin testified further that only his father was empowered to recognize the Union as representative of the employees because such recognition would have involved a "major policy change," and that at the time of the requests he had been an officer in the newly formed corporation for only a few months and was not "in charge of the business."

Reverting now to the conversations between Sherman Tobin and Lunin in the former's office, Tobin testified that when Lunin called upon him the first time and asked for recognition of the Union, he said to Lunin that A. J. Tobin "was out of town" and that he "would appreciate" Lunin's awaiting the return of
86 A. J. Tobin, and that Lunin departed without comment about the absence of A. J. Tobin. With respect to their second conversation, Sherman Tobin testified that Lunin said that he represented "the employees of my plant" and that "either 97 or 98 percent of my employees [were] in the union"; that Tobin expressed doubt but did not ask Lunin for proof; that Tobin reiterated the request that Lunin await A. J. Tobin's return "within a few weeks or so;" and that Lunin again departed without comment. Lunin's testimony, on the other hand, varies substantially from that of Sherman Tobin. Lunin denied that Sherman Tobin advanced the absence of A. J. Tobin as necessitating a postponement of the Union's requests for recognition. According to Lunin, in the first conversation Sherman Tobin expressed a doubt that the Union possessed majority status, to which Lunin replied by offering to prove it, and that Tobin said that he would not recognize the Union and that he opposed the organization of the employees. Sherman Tobin denied, however, that he told Lunin that he opposed the organization of the employees. For the reasons set out in the footnote, I reject the testimony of Tobin and find that Lunin offered to prove the Union's claimed majority status and that Tobin expressed opposition to the Union and refused to recognize it because of that opposition rather than the absence of A. J. Tobin.[10]

[10] *First*, I do not believe that, had Sherman Tobin asked at each conversation that there be a delay in consideration of the request for recognition until A. J. Tobin returned, that Lunin would have terminated the conversation without comment upon

87 On September 4, driver-salesmen Yost and Shanon spoke with Supervisor Carnifax about Sherman Tobin's refusal to deal with the Union. Carnifax told these employees that he understood that Sherman Tobin "would in no way recognize the union." On the following day, the Sunday preceding Labor Day, the driver-salesmen met again. All driver-salesmen attended, with the exception of William G. Wood, who was out of town, and R. Nelson, who was not associated with the organizational activity. The employees voted unanimously to strike if the Respondent continued its refusal to recognize the Union.[12]

On Tuesday, September 7, the next working day, the driver-salesmen held a short meeting near the plant, and then went to the plant in a body. Conversations occurred there with Sherman Tobin and Charles M. Dismukes, the Respondent's sales manager, but again their is conflicting testimony. The employees, along with Lunin and Francis J. Reilly, president of the Union, arrived at the plant at about the usual hour for commencing work, but with the intention of effectuating the strike vote if need be. Sherman Tobin was then at home. Dismukes testified for the Respondent that he told Lunin and Reilly that he under-
88 stood why they were there and that he would telephone Sherman Tobin to come to the plant. Tobin arrived within an hour, and the driver-salesmen, along with Lunin and Reilly, waited across the street from the plant. They were waiting there, past the usual hour for commencing work, when Tobin arrived.

The Respondent's position is that Lunin and Reilly alone, for the Union, talked with Sherman Tobin and Dismukes, for the Respondent. According to Sherman Tobin, Lunin began the conversation by saying that some employees were gathered across the street, refusing to work, but that they would begin work if the Respondent agreed to recognize the Union as their representative, and that he said again that only A. J. Tobin was empowered to act upon the request for recognition and that he "would appreciate" Lunin's awaiting the return of A. J. Tobin. Sherman

---

the absence of A. J. Tobin. *Second*, the testimony of Baruch, the Respondent's office manager, concerning remarks to him by Sherman Tobin, as discussed below, demonstrates Tobin's hostility to the Union. *Third*, Tobin testified that he possessed authority to hire and discharge employees, to make purchases necessary to the operation of the business, and to change the rates of pay for employees. In addition, he possessed authority to retain counsel other than the Respondent's usual attorney, to represent the Respondent in labor matters, as also related below. Under these circumstances, coupled with Sherman Tobin's references in his testimony to the Respondent's plant as "my plant" and to the employees as "my men" and "my employees," I find that he was empowered to grant to a labor organization the recognition required by the Act.

[12] While there is some conflict in the testimony concerning the date on which the strike vote was taken, it appears from the testimony of two witnesses for the Respondent, as well as certain witnesses for the General Counsel, that the correct date is September 5, as found. Thus, Supervisor Carnifax testified that there had been "talk" of a strike before September 4 and that, on that day, in talking with driver-salesman Freeman about the meeting to be held on the following day, he sought "to discourage Mr. Freeman from * * * getting involved in a strike vote * * *." Another witness for the Respondent, Clifford Voight, a driver-salesman who attended the meeting, testified that it was held on September 5 and that the employees voted to strike.

Tobin testified further that Lunin again made no comment about the absence of A. J. Tobin, and that the conversation ended.[13] On the other hand, the General Counsel's testimony is that the employees' negotiating committee also was present at the conversation and that Sherman Tobin rejected the demand for recognition with the statement that he opposed the organization of the driver-salesmen.[14] Both Lunin and Reilly testified that Tobin based the refusal to recognize the Union upon the ground that he opposed the organization of driver-salesmen and not upon the ground that only A. J. Tobin could act upon the demand for recognition. Croon testified that Tobin expressed opposition to the organization of driver-salesmen, and that Tobin "mentioned something" about the absence of his father, but Croon could not recall any remark by Tobin that he was not empowered to grant recognition. For the reasons set out in the footnote, I find that Tobin based his refusal to recognize the Union upon his opposition to the organization of the driver-salesmen.[15]

89

These employees continued their refusal to work and established a picket line outside the plant, as well as another line at the Respondent's office three-fourths of a mile away. Supervisor Carnifax testified that all driver-salesmen, other than Nelson and Wood, went on strike, and driver-salesman Voight,

90

[13] Sales Manager Dismukes testified for the Respondent also that Sherman Tobin replied to Lunin's demand for recognition by saying that only A. J. Tobin could act upon the demand. However, Dismukes and Sherman Tobin were not in agreement about the entire subject matter of the conversation. Tobin testified that his sole reason for refusing the demand for recognition was that he was not empowered to act upon it, and that he said nothing in this conversation about the Union's lack of majority status. On the other hand, Dismukes testified that Tobin disputed Lunin's claim of majority status. There is testimony by witnesses for the General Counsel concerning the Union's claim to possess majority status as discussed in this conversation, but I believe it unnecessary to detail the evidence or evaluate it in view of Sherman Tobin's testimony that he never asked for proof of that status and that his sole reason for rejecting the demand for recognition was his lack of authority to act upon it.

[14] The members of the negotiating committee, as found above, were Freeman, Shannon, and Croon. Although the Respondent asserts that none of them was present at the conversation, the Respondent does not necessarily contend that they were across the street with other driver-salesmen. According to Dismukes, about half the driver-salesmen were inside the plant, and Sherman Tobin testified that there "were men outside the plant; there were men inside the plant; there were men all over the place." The testimony of the General Counsel's witnesses, on the other hand, is that Freeman, Shannon, and Croon were present at the conversation and that all other driver-salesmen, except Wood and Nelson above-mentioned, remained across the street from the plant. Shannon was not a witness. Croon testified that he was present. Freeman testified that he was present, and his presence is established by other witnesses, but Freeman's testimony, for reasons set out below, is unreliable and is not credited in determining the remarks made during this conversation. In addition, there is credible testimony of employees who remained outside the plant that the members of the negotiating committee accompanied Lunin and Reilly, and I accept this testimony as true. Moreover, I do not believe that the committee, having been selected by the employees to participate in negotiations, would have remained outside the plant.

[15] First, Sherman Tobin's remarks to Baruch soon after the start of the strike, as discussed in the next paragraph, establish Tobin's hostility to the Union and that his reason for refusing recognition was that hostility, rather than the absence of A. J. Tobin. Second, as above related, on September 4, Supervisor Carnifax told Yost and Shannon that Tobin would not recognize the Union and, as related below, 2 days after the commencement of the strike Carnifax told Yost and Shannon that Tobin would not recognize the Union and "did not want any part of the Union in his business establishment." Third, when the Union's officers, Lunin and Reilly, and the negotiating committee reported to the strikers across the street from the plant after the conversation with Tobin and Dismukes, the report was that Sherman Tobin had expressed opposition to the organizational efforts of the driver-salesmen in refusing the request for recognition, and it does not appear that on this or any earlier occasion the men were advised that the absence of A. J. Tobin had been advanced as a reason for refusing recognition.

another witness for the Respondent, testified that all of the strikers engaged in picketing. Arthur Mack, also a witness for the Respondent, testified that there was no work performed during the initial week of the strike, and it is clear that the Respondent's operation ceased during that period.

Shortly after the conversation last described, Tobin and Dismukes went from the bottling plant to the office. Upon arriving there, Tobin and Office Manager Baruch engaged in a brief conversation. Baruch testified for the General Counsel that Tobin and Dismukes were discussing the strike in his presence; that he suggested Tobin and Dismukes "speak to the men or their representative in order to stall the strike and give them more time"; that Tobin rejected the suggestion; and that Tobin said he objected to dealing with the Union because he did not care to have it "gain a foothold" and tell him thereafter "what to do or what not to do." Baruch testified further that Tobin said he intended "to fight the strike"; that there was some discussion between Tobin and Dismukes concerning the identity of attorneys familiar with labor law; that Tobin telephoned an attorney named Pace who had represented the Respondent in other matters; that Pace referred Tobin to Attorney Bernstein; and that Tobin thereupon
91 telephoned Bernstein and made an appointment for the next morning. Both Tobin and Dismukes were witnesses for the Respondent but neither testified concerning the events as related by Baruch. Tobin did testify, however, in connection with another aspect of the case, that he consulted Attorney Bernstein on the day the strike commenced or the following day, and Bernstein, in a statement on the record, said he had been retained by Tobin at about that time and that he had not represented the Respondent in any earlier matter.[16] I accept Baruch's testimony and find that Sherman Tobin made the statements attributed to him by Baruch.[17]

---

[16] Baruch testified on cross-examination that he was discharged by Sherman Tobin about 3 weeks later upon the ground that he had not taken "a sufficient interest in the" Respondent, that the termination of his employment was not on a friendly basis, and that he later filed a claim with the Wage and House Administration that he had not been remunerated properly by the Respondent. While these events require a careful scrutiny of Baruch's testimony for possible bias, the surrounding circumstances corroborate him, and there is no denial by Tobin or Dismukes. In the following respect, if at all, Tobin made a denial. He answered negatively to the question: "Did you make any statement in that conversation [during the second week of the strike] or in any other conversation with Mr. Lunin or Mr. Reilly, or with any of your employees present, that 'I will have no union here' or 'I will have no union in my plant'?"

[17] During his employment by the Respondent, Baruch was office manager. The motion to strike Baruch's testimony concerning the conversation is upon the ground that he, Tobin, and Dismukes, were all supervisors and that "conversations between supervisors not in the presence of rank and file employees are privileged." The Respondent cites as authority Consumers Cooperative Refinery Association, 77 N. L. R. B. 528; Magnolia Cotton Mill Co., Inc., 79 N. L. R. B. 91; and Ecusta Paper Corporation, et al., 66 N. L. R. B. 1204. These cases are not in point. The case principally relied upon, Consumers Cooperative, insofar as apposite here, simply holds that (1) certain evidence of antiunion motivation, in remarks between representatives of management, was too remote in point of time when viewed in the particular circumstances of that case to have probative value; and (2) antiunion remarks of one management representative to another, when not communicated to rank and file employees, do not constitute violations of Section 8 (a) (1) of the Act. Here,

92 On the first day of the strike, Reilly, president of the Union, talked with various employees, other than driver-salesmen, who had not been solicited to join the Union and for whom the Union had not made a bargaining demand.[17] The conversations took place outside the plant, principally during lunch hour. Reilly advocated that they join the strike, saying that the Union would seek higher wages for them. They agreed, and joined the picketing. At least two of them signed applications for membership in the Union.[18]

On September 9, 2 days after the start of the strike, driver-salesmen Yost and Shannon talked with Supervisor Carnifax near the respondent's offices. Shannon asked Carnifax whether Sherman Tobin would recognize the Union and reinstate the strikers if they applied for reinstatement. Carnifax replied that Tobin would not recognize it, that Tobin "did not want any part of the union in his business establishment," and that Tobin would reinstate no more than one or two employees.[19] On the same day, the Respondent commenced recruiting new em-

93 ployees to replace the strikers, and this activity continued through the remainder of the week. The new employees were trained for their positions at the residence of A. J. Tobin, preparatory to beginning work the next week.

On Friday, September 10, a regular payday, the Respondent decided to pay the employees at its office, rather than at the plant as was usual. Sales Manager Dismukes testified that he and Sherman Tobin received the employees singly so that they would have an opportunity to request reinstatement. Tobin testified that he decided upon the unusual procedure in order that the strikers could "ask for their jobs back," but that only two persons, Treacy and Voight, made the request. The issue concerning requests for reinstatement is discussed under section III, C, below.

On Monday, September 13, Lunin executed a petition for certification of representatives, for filing with the Board, in which the appropriate unit was described as "all driver-salesmen and

---

however, the remarks of Tobin to Baruch present no problem of remoteness, nor is there any contention that those remarks violated said subsection. The issue is whether those remarks may be considered in determining if the Respondent was motivated by hostility to the employees' organizational efforts in refusing to recognize the Union as their representative. I hold that the remarks may be so considered.

[18] Mack, a witness for the Respondent, testified that all the "plant help" except himself, numbering about five persons, joined the strike. Treacy, another witness for the Respondent, testified also that all of the "plant help" except Mack agreed to join the strike. The positions of the parties with respect to the inclusion of "plant help" within the unit is discussed in the section entitled "The appropriate unit," infra.

[19] Shannon was not a witness, and this finding is based upon the testimony of Yost. Carnifax was not questioned about the conversation. Carnifax's testimony, insofar as it bears upon that of Yost, is that no striker asked him for reinstatement or requested that he convey an application for reinstatement to Sherman Tobin or Dismukes, and that no employee asked him to talk with Tobin about reinstatement of the strikers. It is clear, however, from Yost's testimony, that Shannon did not ask for reinstatement of himself or anyone, but whether, if reinstatement were asked, it would be granted. It is clear too that the conversation dealt primarily with the matter of recognition of the Union, not reinstatement.

plant help." On the same day, the new driver-salesmen commenced work and operations were resumed. Three driver-salesmen resumed their duties: Wood, who had been absent on leave; Nelson, who had not joined the strike; and Voight, who had asked for reinstatement the preceding Friday. According to Treacy, the several plant employees, with one exception, also returned to work. The picketing ceased 2 or 3 days later.

On September 21, Alden Hopkins, a field examiner for the Record, notified the Respondent and the Union that she would confer with them at the Company's offices on September 27. On the latter date, the conference was held. Reilly and Lunin
94 were present on behalf of the Union, Sherman Tobin was present on behalf of the Respondent, and A. J. Tobin, whose absence from town, according to the Respondent, had been the reason for rejecting the Union's demand for recognition, was "in and out of the conference." Sherman Tobin opposed the Union's effort to achieve recognition by following the procedure of a petition for certification, and took the position that the driver-salesmen were independent contractors and not "employees."[20] Later that day, Sherman Tobin arranged a conference for himself, Field Examiner Hopkins, and Bernstein in the attorneys' office. No one else attended, and the evidence concerning this conference consists of a statement by Attorney Bernstein.[21] According to Bernstein, he took the position that the Respondent was not engaged in commerce and that the driver-salesmen were independent contractors, but that in the event of an election, as he understood the applicable law, the employees who had been replaced during the strike would be ineligible to vote while their replacements would be eligible. According to Bernstein, he also told Hopkins that he had no doubt that an election under such circumstances would result in the rejection of the Union by the new employees, that Hopkins expressed agreement with his understanding of the eligibility to vote, and that he then told Hopkins that he was sure the Respondent would agree to a consent election
95 under those circumstances, but that he expressed doubt that the Union would agree. Bernstein said further that Hopkins advised him the next day that the Union had refused to consent to an election.[22]

---

[20] This finding is based upon the testimony of Lunin and Reilly. A. J. Tobin was not a witness, and Sherman Tobin testified that he did not recall any discussion of the question whether the driver-salesmen were "employees." The question, it should be noted, was not raised at the hearing as a defense to the refusal to bargain.

[21] The evidence by Attorney Bernstein was in the form of an unsworn statement, made without examination by his associate counsel or cross-examination by the General Counsel. The statement was received as the equivalent of sworn testimony, all counsel being agreeable, under the rules of practice and evidence in the State of Florida governing the participation of attorneys as witnesses.

[22] On cross-examination of Lunin and Reilly, the Respondent sought unsuccessfully to establish that during the conference in the Respondent's office on September 27 there was a discussion with Field Examiner Hopkins concerning the eligibility of employees to vote. It appears, however, that the question was raised first by Attorney Bernstein later that day when he talked with Hopkins.

On October 7, the Union filed an amended petition, changing its contention concerning the confines of the appropriate unit from driver-salesman and plant help to driver-salesmen alone. By letter of October 7, the Regional Director asked the Respondent for its position on the amended petition. On October 18, Sherman Tobin replied by letter in which he asserted in part that the Respondent was not engaged in commerce and that the driver-salesmen were independent contractors. On October 26, Lunin requested permission of the Regional Director to withdraw the amended petition, and by letter of the next day, the Regional Director notified the Respondent and the Union that he had approved the withdrawal. On February 7, 1949, Lunin filed the charge initiating this proceeding.

B. THE REFUSAL TO BARGAIN

1. The appropriate unit

The General Counsel contends that the driver-salesmen, numbering about 12, and several persons employed in a trainee capacity for the job of driver-salesmen, constitute and appropriate bargaining unit. These are the employees among whom the
96 Union engaged in organizational activity before the strike.[23] The Respondent, on the other hand, contends that, in addition, the appropriate unit includes the following categories of employees: bottling machine operators, loaders, unloaders, mechanics, advertising men, refrigerator men, and "other persons who perform any function in and around the plant or the sales of the product." The Union's original petition, filed after some of the plant employees had joined the strike of the driver-salesmen, describes the unit as "All Driver Salesmen and Plant Help," and the Respondent asserts that this description conforms substantially to its own position on the appropriate unit. This assertion is not borne out by the record.

The Respondent's product, 7-Up, is bottled at the plant. Distribution is by truck. The process by which the bottles are cleaned, filled with the drink, and capped, is performed largely by machinery. Employees who work within the plant are interchanged from one task to another as the need arises, and perform such operations as the following: operate the bottling machinery in the process of cleaning the bottles and filling them with the product, inspecting the bottles, placing the filled bottles into cases and loading them on to trucks, and repairing and painting the cases. These employees are paid an hourly wage and work under

[23] As used herein, the term "driver-salesmen" sometimes include the several trainees.

the supervision of D. Cohen, the plant manager, who, in turn, works under the supervision of Sales Manager Dismukes.

The territory in which the Respondent sells its product is divided into areas, which are covered by the driver-salesmen in distributing 7-Up to retail outlets. The driver-salesmen work uncertain hours, commencing at 7 a. m. and ending at the
97 completion of their rounds. The trucks are loaded each evening, generally by plant employees, preparatory to making deliveries the next day. The driver-salesmen are paid on a commission basis, 7 cents for each case of 7-Up sold, plus $12 per week. They work under the supervision of Carnifax and Chapman, route supervisors, who, in turn, work under the supervision of Dismukes. The trainees for positions as driver-salesmen are in training for periods of several weeks both inside the plant and on routes, during which they are paid on a salary basis, and after which they become driver-salesmen.

In addition to the above categories of employees, the Respondent contends that the appropriate unit includes a mechanic, an advertising man, and a refrigeration man. These three employees are paid on a salary basis. The mechanic's duties require him to maintain a fleet of trucks in operating order, and repairs are made at places of breakdown along the routes and at the Respondent's garage located at the office building.[24] The duty of the advertising man is to erect advertisements near or outside the places of business of the Respondent's customers. The refrigeration man is a mechanic who maintains in working order the coolers and vending machines located in the customers' establishments.

The Board has held that driver-salesmen constitute an appropriate unit in the soft drink industry.[25] In the Respondent's operations, the work of these employees is largely apart from the other employees who, the Respondent contends, should be
98 included within the unit. The driver-salesmen have to undergo periods of training for the special requirements of their positions, are not interchanged with other employees, perform their functions away from the plant, and are compensated on a different basis. In my opinion, the driver-salesmen and the trainee driver-salesmen, whose interests coincide with the interests of the driver-salesmen, constitute an appropriate bargaining unit. These are the employees who initially sought self-organization and whose demands for collective bargaining were rejected by the Respondent. I do not believe that the unit became less appropriate by reason of the Union's petition, filed after the strike began, in which the unit was described as including

---

[24] Plant Foreman Cohen performs similar duties in addition to his supervisory functions. The Respondent does not contend that Cohen should be included within the unit.

[25] See Rockford Coco-Cola Bottling Co., 81 N. L. R. B. 579, and cases cited therein.

also the plant help.[26] The approximately half dozen plant employees who joined the strike during the initial week had not earlier demonstrated an interest in self-organization and appear to have remained apart from the organizational activity of the driver-salesmen. As noted, their duties and responsibilities, their method of compensation and place of work, and other incidents of their employment, establish their separable work interests. I find that the Respondent's driver-salesmen and trainee driver-salesmen constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

99 2. Representation by the Union of a majority in the appropriate unit

A portion of the evidence offered by the General Counsel to establish the majority status of the Union consists of payroll records of the Respondent plus a number of applications by employees for membership in the Union. Before discussing these documents, it should be stated that a number of the applications were identified by driver-salesman Freeman as having been received by him from the employees whose names are signed thereto. The Respondent's own evidence establishes that Freeman was active in the organizational activity and it is clear that he sought applications from employees in the unit. But Freeman was not a reliable witness and on this aspect of the case, as well as on other aspects I am unable to credit his testimony. Consequently, the determinations below concerning the Union's majority status are based upon testimony of witnesses other than Freeman.[27]

According to the Respondent's payroll for the workweek ending August 18, 11 employees are within the appropriate unit.[28] A majority, 6, were members of, or had designated the Union to represent them.[29] During the next workweek, that ending

[26] The Respondent's construction of the term "plant help," as embracing the various categories of employees named above, numbering about 15, some of whom perform the principal portions of their duties away from the plant, varies from the contention of the Union as expressed in the petition. The petition lists the number of employees among the "driver-salesmen and plant help" as 18, of whom, as noted in footnote 26, 14 were driver-salesmen and trainees. Moreover, as noted in footnote 12, Mack, a witness for the Respondent, testified that the "plant help" numbered only about 6 persons.

[27] Freeman's demeanor on the witness stand, coupled with certain inaccuracies in his testimony as reflected in the transcript, demonstrate his unreliability as a witness. For instance, Freeman testified that all employees whose reinstatement is sought by the General Counsel attended all union meetings, but L. Case, Charles Fisher, and Robert Studley were not employed by the Respondent until after August 25. Freeman also testified that an application for membership bearing Fisher's name was signed on August 16, but Fisher was not employed until early September.

[28] Freeman, Shannon, Croon, Yost, Klein, Walls, Wood, Miley, MacCubbin, Hetherington, and Nelson.

[29] Freeman's application card is dated August 16, and he was the employee most active in soliciting applications for membership. Shannon, a member of the negotiating committee, had been a member of Local No. 98, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, since 1945, but

August 25, the situation remained substantially the same.[30] During the workweek ending September 1, the Union's majority
100 continued,[31] as it did during the workweek ending September 8, the day after commencement of the strike.[32] Moreover, although I have not relied upon certain application cards identified by Freeman in making the above findings, the record is clear that a number of persons whose names are signed to those cards were in attendance at the meeting on September 5, at which the strike vote was unanimous, and that they thereafter went on strike and picketed. Finally, the testimony of Sherman Tobin, Voight, and Treacy, all witnesses for the Respondent, leaves no doubt concerning the sizeable participation of the driver-salesmen in the strike, and Sales Manager Dismukes testified that he had no doubt about the Union's majority status upon seeing the number of driver-salesmen engaged in the strike. I find that all employees in the appropriate unit, other than Wood, who was on leave, and Nelson, engaged in the picketing. I find further that participation in a strike, called by a labor organization for the purpose of obtaining recognition as the majority representative, is an effective means of designation such organization as the
101 strikers' representative, particularly when, as here, participation is voluntary and all strikers engage in picketing from time to time.[33]

I find that on August 18, 1948, and at all times thereafter, the Union was the duly designated representative of a majority of the employees in the appropriate unit and, pursuant to Section 9 (a) of the Act, was the exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

---

did not transfer his membership in Local No. 390 until October 3, 1948. Croon, Yost, Klein, and Walls testified credibly that they signed application cards on August 10, 18, 10, and 15 respectively.

[30] Voight, an above-mentioned witness for the Respondent, was employed during that workweek. The employment of Miley and Hetherington ceased on August 24 and 25, respectively.

[31] The employees in the appropriate unit, as shown on the payroll for this period, numbered 13: Freeman, Shannon, Croon, Yost, Klein, Walls, Wood, MacCubbin, Nelson, Case, Studley, Voight, and Nesta. The first 6 named had designated the Union as their representative, as above related. In addition, Nesta signed an application for membership on August 31, and Voight testified that he signed an application about September 1.

[32] The payroll for this period contains the names of 14 persons as being within the unit, the 13 named in the footnote last preceding, plus Fisher. At least the following 8 persons had designated the Union as their representative: Freeman, Shannon, Croon, Yost, Klein, Walls, Nesta, and Voight.

[33] In *N. L. R. B.* v. *Harris-Woodson Co.*, 179 F. 2d 720, the Fourth Circuit Court of Appeals held that proof of majority status is to be found in the fact that "practically all of the employees went out on strike in an attempt to compel the company to bargain with the union." In addition to the authority cited therein, see *Lebanon Steel Foundry* v. *N. L. R. B.*, 130 F. 2d 404 (C. A. D. C.), cert. den., 317 U. S. 659, 63 S. Ct. 58, where the Court said that authorization to a labor organization that it represent employees in collective bargaining "has been found from participation in a strike vote taken by the union * * * [and] a strike called by the union * * *"

3. The refusal to bargain

It has been found that on and after August 18, 1948, the Union was the exclusive representative of the employees in the appropriate unit for the purposes of collective bargaining, and that, by letters of August 19 and 30, and orally on several days between August 19 and September 7, inclusive, the Union demanded that the Respondent bargain with it. The rejection of those demands is acknowledged. The defense that the Union did not possess majority status in an appropriate unit has been disposed of adversely to the Respondent. Moreover, it is clear that the Respondent did not entertain a good faith doubt concerning the Union's majority status. This is so because: (1) Sales
102 Manager Dismukes acknowledged that he did not entertain a doubt at the time of the strike; (2) Sherman Tobin did not ask for proof of that status; and (3) Tobin testified that his sole reason for rejecting the demand for recognition was his lack of authority to act upon it.

It has been found too that Tobin was empowered to act for the Respondent in granting to the Union the recognition required by the Act and that Tobin did not advance his alleged lack of authority as the reason for rejecting the Union's demand. Instead, Tobin based his rejection upon his opposition to the organization of the driver-salesmen. I find, therefore, that the defenses advanced by the Respondent for its refusal to bargain are not supported by the record.

I find that on or about August 19, 1948, and thereafter, the Respondent refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, and that the Respondent has thereby interfered with, restrained, and coerced, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, I find further that the strike was caused and prolonged by the Respondent's unfair labor practices.

C. THE REFUSAL TO REINSTATE THE STRIKERS

The General Counsel alleges that on various occasions requests for reinstatement were made of the Respondent by certain strikers, individually and in groups, and by their representatives. Since I believe that the following instance is dispositive of the issue, I find it unnecessary to discuss the evidence dealing with the other instances.

103 The events on this occasion were related by Croon and Reilly. Croon testified that during the strike he and others called upon Sherman Tobin in the latter's office.[34] According to Croon, Sherman Tobin was asked "if he wouldn't put the men back to work and let things go through the normal channels—let the Labor Relations Board take care of things, and the men go back to work in the meantime;" but Tobin replied in the negative, saying that "he didn't want to have anything to do with the union." According to Reilly, the conversation took place after the new driver-salesmen commenced work on September 13, but before the end of picketing on September 15 or 16. Reilly testified that Tobin was asked if he would reinstate the men until the issue of recognition was settled by the Board, and that Tobin answered that he had obtained new employees and did not need the services of the strikers.[35] Croon impressed me as honestly endeavoring to relate the truth, and his testimony as to the substance of the conversation receives support in the testimony of Reilly. I accept this testimony and find accordingly.[36]

104 The question remains whether the request of Tobin constituted an unconditional request for reinstatement. I find that it did. It was a request that the issue causing the strike, recognition of the Union, be left to determination by the Board. The request was an expression on behalf of the employees, by the president of the Union and a member of the negotiating committee, of their willingness to return to work without recognition of the Union, thereby abandoning the sole cause of the strike. The request that Tobin await settlement of the issue by the normal processes of the Board in a representation proceeding does not, in my opinion, attach a condition to the request for reinstatement. As unfair labor practice strikers, the employees were not vulnerable to refusals to reinstate them. The refusal was in dero-

---

[34] Croon could not recall which persons accompanied him, but he testified that Reilly and Freeman were present and that Klein or Shannon may have been present.

[35] Reilly identified Croon and Freeman as having been present, and Klein as absent, but he was uncertain about Shannon. As related, Shannon was not a witness. Freeman, whose testimony has been rejected, was not asked specifically about this conversation with Tobin, although he testified concerning other alleged requests for reinstatement. It appears from his testimony, however, that he was not present.

[36] Tobin denied that the conversation took place. He testified that his only conversation concerning reinstatement, aside from the incidents when employees received their pay on September 10, was on September 16 when he was asked for reinstatement coupled with recognition. The evidence concerning this conversation has not been set forth herein. I am unable to credit Tobin's denial. He impressed me as an unreliable witness. In addition to the reasons already related for this impression, he acknowledged having signed an affidavit in which he represented himself as general manager of the Respondent when, so he testified, the representation was unwarranted. The substance of his testimony is that the striking employees, having struck to obtain recognition of their labor organization and having seen the strike become unsuccessful with the employment of the new driver-salesmen, made no effort to deal with him during the strike, and that the only person who made such effort was Lunin at the strike's end. Moreover, Tobin's attitude toward reinstatement of the striking driver-salesmen is illustrated by the statement of Supervisor Carnifax, quoted above, that Tobin "did not want any part of the union in his business establishment" and that Tobin would reinstate no more than one or two of the strikers.

gation of the strikers' statutory rights and constituted a violation of Section 8 (a) (3) and (1) of the Act.[37]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section
105 III, above, occuring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the union represented a majority of the employees in the appropriate unit and that the Respondent refused to bargain collectively with it. Accordingly, I shall recommend that the Respondent, upon request, bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit.

It has been found also that the employees went on strike on September 7, 1948, in protest of the above unfair labor practices, and that thereafter the Respondent discriminatorily refused to reinstate a number of them. I shall recommend, therefore, that the Respondent offer to the employees named in Appendix A, attached, immediate and full reinstatement to their former
106 or substantially equivalent positions,[38] dismissing, if necessary, any employees hired since September 7, 1948, to replace them. Reinstatement shall be without prejudice to the employees' seniority or other rights and privileges. I shall recommend further that the Respondent reimburse said employees for any loss of pay they may have suffered by reason of the discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned

[37] As related in footnotes 8 and 21, driver-salesman Freeman, a witness for the General Counsel, was an unreliable witness. In addition to the instances in which his testimony already has been rejected, there is testimony by him concerning conversations with Supervisor Carnifax in which, the General Counsel asserts, Carnifax made statements in violation of Section 8 (a) (1) of the Act. Again I am unwilling to rely upon Freeman's testimony, and I find that Carnifax did not make the statements attributed to him by Freeman.

[38] In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch, 65 N. L. R. B. 827.

from the date of the discrimination, September 15, 1948, to the date of the Respondent's offer of reinstatement, less his net earnings,[39] during said period, the payment to be computed upon a quarterly basis in the manner established by the Board in F. W. Woolworth Company.[40] I shall also recommend, in accordance with the Woolworth decision, that the Respondents upon request, make available to the Board and its agents all pertinent records.

In view of the nature of the unfair labor practices committed, particularly the unlawful refusals to reinstate the employees, I shall further recommend, in order to make effective the interdependent guarantees of Section 7 of the Act, that the Respondent cease and desist from, in any manner, infringing upon the rights guaranteed in said Section.[41]

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of law

1. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, is a labor organization within the meaning of Section 2 (5) of the Act.

2. The Respondent's driver-salesmen and Trainee driver-salesmen constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, on August 18, 1948, was, and at all times thereafter has been, the exclusive representative of all the employees in such unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, as the exclusive representative of its employees in an appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

5. By discriminating in regard to the hire and tenure of employment of the employees named in Appendix A, and each of them, and thereby discouraging membership in a labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

---

[39] Crossett Lumber Company, 8 N. L. R. B. 440, 497–8.
[40] 90 N. L. R. B. No. 41.
[41] N. L. R. B. v. Express Publishing Company, 312 U. S. 426; 61 S. Ct. 693; N. L. R. B. v. Entwistle Manufacturing Company, 120 F. 2d 532, 536 (C. A. 4).

6. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the
108 Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, I hereby recommend that the Respondent, Seven Up Bottling Company of Miami, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, as the exclusive representative of the Respondent's driver-salesmen and trainee driver-salesmen;

(b) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, or any other labor organization of its employees, by refusing to reinstate any of its employees because of their union membership or activity or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

109 (c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., Local Union No. 390, as the ex-

clusive representative of all employees in the aforesaid appropriate unit, and embody any understanding reached in a signed agreement;

(b) Offer to the employees whose names are set forth in Appendix A, attached, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner set forth in "The remedy";

(c) Make whole the employees whose names are set forth in Appendix A, attached, in the manner set forth in "The
110 remedy," for any loss of pay each may have suffered as a result of the Respondent's discrimination against them;

(d) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary for a determination of the amounts of back pay due and the right of reinstatement under the terms of these recommendations;

(e) Post at both its plant and offices in Miami, Florida, copies of the notice attached hereto and marked Appendix B. Copies of the notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent, immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(f) File with the Regional Director for the Tenth Region within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, a report in writing setting forth in detail the steps which the Respondent has taken to comply herewith.

It is further recommended that, unless the Respondent within
111 twenty (20) days from the receipt of this Intermediate Report and Recommended Order notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring it to take the action aforesaid.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order.

or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

112 In the event no Statement of Exceptions if filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 28th of September 1950.

A. Bruce Hunt,
(A. Bruce Hunt),
Trial Examiner.

Appendix A, omitted, printed side page 6 ante

113 *Appendix B*

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommendations of A Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen And Helpers of America, A. F. L., Local Union No. 390, or in any other labor organization of our employees, by refusing to reinstate any of our employees because of their union membership or activities or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the National Labor Relations Act.

We Will, upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen And Helpers of America, A. F. L., Local Union No. 390, as the exclusive representative of all our employees in the appropriate unit, with respect to rates of pay, wages, hours of employment,
114 and other conditions of employment, and, if an understanding, is reached, embody such understanding in a signed agreement. The bargaining unit is:

All driver-salesmen and trainee driver-salesmen.

We Will Offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination.

Walter F. Croon, Nat Freeman, Joseph L. Klein, Lawrence T. Nesta, Marvin L. Walls, James P. Yost, Robert D. MacCubbin, T. Shannon, L. Case, Charles F. Fisher, Robert W. Studley.

All our employees are free to become or remain, or to refrain from becoming or remaining, members in good standing of the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

SEVEN UP BOTTLING COMPANY
OF MIAMI, INC.,
(*Employer.*)

By ——— ———,
(*Representative*), (*Title*).

Dated ———

115 This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

(Affidavit and Return Receipts omitted.)

* * * * *

In United States Court of Appeals for the Fifth Circuit
[Title omitted.]

Certificate of the National Labor Relations Board

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "In the Matter of Seven Up Bottling Company of Miami, Inc., and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local Union No. 390," the same being known as Case No. 10-CA-619 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

116 Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Reeves Hilton Trial Examiner for the National Labor Relations Board, dated December 13, 1949.

(2) Affidavit of service of Trial Examiner Hilton's order granting motion for bill of particulars, dated December 13, 1949, together with United States Post Office return receipts thereof. (Trial Examiner's order is General Counsel's Exhibit No. 1-K.)

(3) Order designating A. Bruce Hunt Trial Examiner for the National Labor Relations Board in place of Reeves Hilton dated February 7, 1950.

(4) Stenographic transcript of testimony taken before Trial Examiner Hunt on February 7, 8, 9, and 10, 1950, together with all exhibits introduced in evidence.

(5) Letter from Respondent dated February 20, 1950, requesting an extension of time for filing brief before the Trial Examiner.

(6) Copy of telegram dated February 21, 1950, from Chief Trial Examiner granting all parties an extension to file briefs.

(7) Copy of Trial Examiner Hunt's Intermediate Report, dated September 28, 1950 (annexed to item hereof); order transferring case to the Board, dated September 28, 1950, together with affidavit of service and United States Post Office return receipts thereof.

117 (8) Letter from Respondent dated October 9, 1950, requesting permission to argue orally before the Board. (Denied. See Board's Decision and Order dated January 26, 1951.)

(9) Telegram from Respondent dated October 17, 1950, requesting an extension for filing brief in support of exceptions.

(10) Copy of Board's telegram dated October 17, 1950, granting all parties extension of time for filing briefs.

(11) Respondent's exceptions to the Intermediate Report, received October 19, 1950.

(12) General Counsel's exception to the Intermediate Report acknowledged October 23, 1950.

(13) Charging Party's response to employer's exceptions to the Intermediate Report of the Trial Examiner, dated October 27, 1950.

(14) Copy of Decision and Order issued by the National Labor Relations Board on January 26, 1951, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 5th day of July 1951.

Frank M. Kleiler,
(S) Frank M. Kleiler,
(FRANK M. KLEILER),
Executive Secretary, National Labor Relations Board.

RESPONSE AND ANSWER FILED: AUGUST 30, 1951

In the United States Court of Appeals for the Fifth Circuit

No. 13,714.

THE NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.,
RESPONDENT.

RESPONSE AND ANSWER
To Petition for Enforcement of an Order of the National Labor Relations Board.

To: The Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The Seven-Up Bottling Company of Miami, Inc., Respondent herein, files this, its Response and Answer to the Petition presented to this Honorable Court for the Enforcement of a certain Order issued by the National Labor Relations Board, hereinafter referred to as "The Board," against said Respondent; and for response and answer shows:

1. Respondent admits the allegations of Paragraph 1 of the Petition for Enforcement insofar as said Paragraph alleges that Respondent is a Florida corporation engaged in business in the State of Florida, and insofar as it alleges the jurisdiction of this Court.

2. Respondent admits the allegations of Paragraph 2, 3 and 4 of said Petition for Enforcement insofar as said Paragraphs allege procedural steps that have been taken in this cause, as revealed

by the entire record thereof, certified by the Board and filed with this Court. Respondent admits service of said Decision and Order referred to in Paragraph 2 of the Petition upon the Respondent and upon Respondent's counsel.

3. Respondent denies that Respondent had or has committed any unfair labor practice under the terms of the National Labor Relations Act as amended within this judicial circuit. Respondent shows further that the said Decision and Order of the Board above referred to was not supported by substantial evidence in the Record considered as a whole, and for that and other reasons, as will be shown by examination of the Record and as will be set forth hereinafter in this Answer, was issued contrary to law.

4. Respondent in further answering said Petition for Enforcement shows that after the Trial Examiner issued his Intermediate Report in said matter, that the Respondent did then, as provided by the regulations of the said Board, file Exceptions to the Findings and Conclusions of Fact and Law, as well as the Recommendations of the Trial Examiner, contained in said Intermediate Report in all respects wherein said findings, conclusions of fact and law and recommendations referred to, found or alleged a violation of Sections 8 (a) (1), 8 (a) (3), or 8 (a) (5) of the National Labor Relations Act, as amended; or found, or purported to find, a refusal to bargain collectively within the meaning of the National Labor Relations Act, the discouraging of membership in a labor organization by discriminating in the hiring or rehiring of employees, or in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the National Labor Relations Act as amended.

A copy of the Respondent's Exceptions to the said Intermediate Report of the Trial Examiner has been filed with this Court and in reference to the said Exceptions is prayed as often as may be necessary.

5. Respondent shows that said Board based its said Decision and Order, to-wit, that the Respondent had interfered with and coerced its employees in the rights guaranteed by Section 7 of the National Labor Relations Act as amended; that it had refused to bargain collectively with the Local 390 of International Brotherhood of Teamsters, etc., and that it had discouraged membership in the said Union by refusing to reinstate certain of its employees who had engaged in a strike upon the findings of its Trial Examiner. Respondent shows that the said findings of the Trial Examiner and the Decision of the Board based thereon are not based upon substantial evidence in the Record of the proceedings considered as a whole, were contrary to said evidence, and that the said Decision

and Order sought to be enforced in this cause is without substantial evidence to support it. Respondent shows further that the Order set forth in Paragraph 2 of the Petition for Enforcement is based upon findings of fact and conclusions of law from which the Board has drawn certain other conclusions which are contrary to the evidence in the Record considered as a whole based upon suspicion and inference contrary to the fair preponderance of the affirmative testimony and evidence, which shows as a matter of fact and as a matter of law that the Respondent did not engage in any activity or commit acts in contravention of the terms of the National Labor Relations Act as amended.

6. Respondent shows that the Recommendations of the Trial Examiner and subsequent Decision and Order of the Board based upon the findings of said Trial Examiner were arbitrary findings on the part of the said Board and its Trial Examiner; said findings were not supported by substantial evidence in the Record considered as a whole, and were contrary to law; that the Board erred in issuing the Order set forth in Paragraph 2 of said Petition for Enforcement in the following particulars:

(a) Insofar as the Board failed to dismiss that portion of the Complaint which alleged violation of Section 8 (a) (5) (Refusal to Bargain) of the National Labor Relations Act, despite the fact that no allegation of such violation or such refusal to bargain was made within the six months statute of limitation period, as provided in Section 10 (c) of the National Labor Relations Act as amended.

(b) Insofar as the Board found that a unit of Respondent's Driver Salesmen and Driver Salesmen Trainees was an appropriate unit for bargaining under Section 9 of the National Labor Relations Act, contrary to the express provisions of Section 9 (c) (5) of the Act, which prohibits the Board's making a determination of an appropriate unit upon the desires of the employees participating or extent of Union organization, rather than upon proper evidence adduced to the Board.

(c) Insofar as the Board found that the Respondent did not have a bona fide and proper doubt both as to the appropriate unit and as to the majority status of the Union at the time said Union requested recognition; and insofar as the Board found that at the time of the Union's request for recognition the Union did actually represent a majority of the Respondent's employees in an appropriate unit as defined in the National Labor Relations Act.

(d) Insofar as the Board imputes an illegal refusal to bargain as a result of the refusal of a minor officer of a corporation to

grant exclusive recognition in the absence of corporate authority to grant such recognition on behalf of the corporation; and in this connection, insofar as the Board found that the conduct of the principal stockholder's inexperienced, young son in requesting the deferral of a request for recognition until the return of his father, the principal stockholder and operating executive of the business, constituted a refusal to bargain within the meaning of the National Labor Relations Act.

(e) Insofar as the Board found that a strike for recognition constituted an "unfair labor practice strike" rather than an "economic strike" within the meaning of those terms as used in normal National Labor Board parlance and as interpreted by the decisions of this and other Courts.

(f) Insofar as the Board found that strikers who had conditioned their return to work upon a formal recognition agreement or a determination of the issue by the National Labor Relations Board had made an unconditional request for reinstatement within the meaning ascribed to such terms under the National Labor Relations Act and the decisions interpreting it.

(g) Insofar as the Board found a violation of Section 8 (a) (3) of the Act on the part of this Respondent in refusing to reinstate certain economic strikers whose positions had been filled prior to any unconditional request for reinstatement.

(h) Insofar as the Board has applied a discriminatory rule in asserting jurisdiction over the Respondent as compared with the rule applied by it in asserting jurisdiction over others similarly situated.

(i) Insofar as the Board has directed as part of its proposed affirmative remedy a punitive rather than a remedial method of calculating back pay due contrary to the purpose and intent of the National Labor Relations Act.

(j) Insofar as the Board accepted and affirmed the findings of its Trial Examiner as to credibility of the witnesses. Respondent further shows in this connection that said findings of the Trial Examiner as to the credibility of witnesses and the action of the Board in affirming said findings was arbitrary, capricious, and contrary to law.

Respondent shows that each of the foregoing matters was urged upon the Trial Examiner as Agent of the Board, and was urged as basis of exceptions to the Recommendations of the Trial Examiner upon the Board itself.

Wherefore, Respondent, having fully answered Petition for Enforcement, prays:

(a) That this Honorable Court set aside the said Order of the Board in whole, and if such prayer is denied, that it set aside said Order of the Board in such part as same is not supported by evidence or is contrary to law as has been hereinbefore set forth in this Answer with particularity and insofar as so set aside that this Court relieve the Respondent, its officers, agents, and representatives of any necessity of complying therewith; and

(b) That this Respondent have such other relief from said Decision and Order as this Honorable Court may deem just and proper.

Respectfully submitted,

SEVEN-UP BOTTLING CO. OF MIAMI, INC.,
By (S) FRANK A. CONSTANGY,
FRANK A. CONSTANGY

(S) ALBERT B. BERNSTEIN
ALBERT B. BERNSTEIN,
Its Attorneys.

FRANK A. CONSTANGY,
1404 Candler Building,
Atlanta 3, Georgia,

ALBERT B. BERNSTEIN,
BERNSTEIN & HODSDON,
Seybold Building,
Miami, Florida.

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:—

ARGUMENT AND SUBMISSION.

(Extract from the Minutes of December 3, 1951.)

NATIONAL LABOR RELATIONS BOARD,

No. 13714, versus

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

On this day this cause was called, and after argument by Mozart G. Ratner, Esq., Assistant General Counsel, National Labor Relations Board, for petitioner, and Frank A. Constangy, Esq., for respondent, was submitted to the Court.

OPINION OF THE COURT FILED: APRIL 29, 1952.

In the United States Court of Appeals for the Fifth Circuit

No. 13,714

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC., RESPONDENT.

Petition for the Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(April 29, 1952.)

Before HOLMES, BORAH, and STRUM, Circuit Judges.

STRUM, Circuit Judge: This is a petition to enforce, and a cross petition to set aside, an order of the National Labor Relations Board, issued January 30, 1951, pursuant to Sec. 10 (c) of the National Labor Relations Act, 29 U. S. C. A. 160 (c), as amended. The order requires respondent to bargain with a designated union as the representative of respondent's driver-salesmen, to reinstate with back pay certain of said employees which the Board found had been discriminatorily discharged because of Union activities, and to post the usual notices of compliance.

The Board's order rests upon findings that respondent violated Sec. 8 (a) (1) and (5) of the Act by refusing to bargain with the Union as the exclusive representative of respondent's driver-salesmen, thereby precipitating a strike, and that by rejecting the strikers' request for reinstatement respondent, in violation of Sec. 8 (a) (1) and (3) of the Act, discriminated against them because

of their union activities, and was therefore guilty of unfair labor practices.

Respondent challenged the Board's jurisdiction on the ground that its activities do not affect interstate commerce, but are essentially local. It also defended upon the grounds that the company official upon whom the Union representative made his demand to bargain, was not authorized to represent the company in such matters; that the company's refusal to bargain was not unlawful, and that it was under no obligation to reinstate the strikers because their request therefor was conditional.

Respondent, a Florida corporation, bottles and distributes a soft drink in the Miami area. The business was incorporated on April 1, 1948, prior to which time it had been operated by A. J. Tobin as sole proprietor. The corporate stock was issued, 50% to A. J. Tobin, 25% to his wife, and 25% to their son, Sherman Tobin. A. J. Tobin, however, was the dominant figure in the corporation, and determined its policies. Tobin, Senior, became seriously ill, and upon the advice of his physician went to New York for medical treatment, to be away for about two months. He was accompanied by his wife. During their temporary absence, they left the business in charge of the son, Sherman Tobin, a young man about 24 years old, who was secretary-treasurer of the company, but who was inexperienced as to the executive and labor policies of the company.

During the absence of Tobin, Senior, and his wife, one John J. Lunin, secretary-treasurer and business manager of a local A. F. of L. Union, demanded of young Sherman Tobin that respondent recognize said Union as bargaining representative of the driver-salesmen, claiming a majority representation of these employees. Young Tobin advised him that he had no authority to make decisions as to policies of plant operation, that he did not think the Union was a good thing for the driver-salesmen, and requested that Lunin await the return of Tobin, Senior, to Miami within a few weeks. He also expressed doubt that the Union represented a majority of said employees. Several requests were made by Lunin upon young Tobin that the latter recognize the Union, but Tobin adhered to his refusal.

At a Union meeting held the latter part of August, 1948, Lunin reported to the drivers that young Tobin had flatly refused to recognize the Union. Thereupon, about September 7, 1948, all but two of the drivers went out on strike, after appearing at the company's plant in a body, accompanied by Lunin and one Reilly, president of the Union, and delivering to young Tobin an ulti-

matum that unless he immediately recognized the Union they would strike. Tobin declined, and the strike went into effect.

Young Tobin thereupon recruited and trained new employees to replace the strikers, and within about a week had the sales trucks operating again, which broke the strike. The former employees then offered to return to work, without recognition of the Union, and let the Labor Relations Board settle the controversy, but respondent declined to reinstate them. Thereupon a complaint against respondent, charging unfair labor practices, was filed by the Union, which complaint culminated in the order now under consideration.

We agree with the Board that the employees' proposal that they return to work and await a determination of the controversy by the Board did not impose an objectionable condition upon their offer to return to work.

Respondent's challenge to the Board's jurisdiction is not well taken. The Board found, and the evidence shows, that while respondent's product is manufactured and all sales made within the State of Florida, it annually imports from states other than Florida raw materials and other supplies valued at more than $82,000, and these materials represent more than 60% of respondent's total purchases. On these facts, respondent is clearly subject to the Act, as the Board found. Imports, as well as exports, constitute interstate commerce within the meaning of the Act. If the flow of commerce is obstructed by labor disputes, it makes no difference in principle whether the interference is with the inward or outward movement of goods. Commerce is affected in either case. *Collins Baking Co. v. N. L. R. B.* (CA-5) 193 Fed. (2) 483. Moreover, respondent is an affiliate of a group of manufacturers of this product in numerous States, operating under a franchise granted by the parent firm in St. Louis, Missouri. The product is marketed under a nationally advertised trade-mark.

It would have been much more consistent with fair play, had the Union representative awaited the return of Tobin, Senior, respondent's chief executive and policy-making officer, whose absence was only temporary, rather than pressing his demands, involving a fundamental and far-reaching executive and labor policy, upon an inexperienced young man temporarily in charge. But these are matters for the Board to consider with the other facts involved.

Notwithstanding the precipitancy of the Union's demands, the fact remains that the business had been left in charge of young Tobin, and he was temporarily operating it. Although he was young and inexperienced, he was a 25% stockholder, and an officer

of the company. While young Tobin protested he had no authority to grant the Union's demand, and questioned the Union's majority representation, he also stated that he opposed the organization of the driver-salesmen, was determined not to recognize or deal with any Union in their behalf, that he would fight the strike, and did not want to have anything to do with the Union. It was for the Board to determine upon the evidence which of these reasons actually motivated him in declining to deal with the Union. The Board adopted the trial examiner's finding that young Tobin refused to recognize the Union because of his opposition to it rather than because of the absence of his father.

This court has recently held that where there is evidence from which conflicting inferences may be drawn, the court will recognize the function of the Board as the trier of the facts, and will not disturb the Board's findings where, as here, they are supported by substantial evidence upon a fair appraisal of the whole record. *N. L. R. B. v. Russell Mfg. Co.*, 191 Fed. (2) 358.

We agree with the Board that the employees covered by the order of January 30, 1951, are entitled to reinstatement with back pay, but we differ with the Board as to the method of computation.

Prior to its decision of June 12, 1950 in the *Woolworth* case, 90 N. L. R. B. 289, the Board awarded the employee a sum equal to what we would have normally earned over the entire period of suspension, less his actual net earnings in other employment during that entire period. Beginning with the *Woolworth* case, however, the Board requires back pay to be computed on a quarterly basis, each quarter standing upon a segregated basis. That method was ordered here.

Respondent objects to the latter method, asserting that since excess earnings by the employee in one quarter do not operate to offset deficiencies in the earnings of another quarter, it would frequently result that the suspended employee would receive more in back pay, computed on that basis, than he would have earned in uninterrupted employment.

The Board justifies its new method of computation upon the ground that employers have sometimes deliberately refrained from offering reinstatement to employees earning higher wages with another employer, because they knew that the greater the delay, the greater would be the reduction in their back pay liability. Thus, says the Board, a recalcitrant employer may profit by continuing to withhold reinstatement from a Union adherent who is then earning more with a new employer than he received from the old. Moreover, says the Board, suspended employees who are receiving

higher pay from another employer; and who are therefore faced with the prospect of steadily diminishing back pay from their former employer, have thus been induced to waive their right to reinstatement in order to stop the running of back pay, and thus preserve the amount then owing them.

Whatever method of computation is used, there will be occasional hardship cases one way or the other, but these exceptional cases should not determine the rule. The ordinary case should be the criterion. The employee is entitled to be made whole, but no more. The employees here involved were not compensated on a quarterly basis. We see no sufficient reason to so compute their back pay during suspension. When a hardship case arises, it can be decided on its own facts. It does not appear that these employees will not be made whole by computing their back pay continuously over the whole period of their suspension, the method followed by the Board itself prior to the *Woolworth* case. We hold such method, rather than the quarterly method, should be followed here. There is nothing to indicate that the conditions apprehended by the Board in the *Woolworth* case, exists here.

With that exception, the Board's order under consideration is

ENFORCED.

JUDGMENT.

(Extract from the Minutes of April 29, 1952.)

NATIONAL LABOR RELATIONS BOARD,

No. 13714, versus

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

This cause came on to be heard on the Petition of the National Labor Relations Board for the Enforcement of an Order of the National Labor Relations Board, made on January 26, 1951, "In the Matter of Seven-Up Bottling Company of Miami, Inc., and International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, A.F.L., Local Union No. 390, Case No. 10-CA-619", and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said National Labor Relations Board in this cause be, and the same is, hereby, ordered enforced in accordance with the opinion of this Court.

PETITION FOR REHEARING FILED: MAY 16, 1952.

In the United States Court of Appeals for the Fifth Circuit

No. 13,714

THE NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.,
RESPONDENT.

MOTION FOR REHEARING AND RECONSIDERATION.

To The Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

The Seven-Up Bottling Company of Miami, the Respondent in the above matter, files this Motion for Rehearing and Reconsideration with the Court in order that the Court may re-examine and issue specific rulings on points which were not ruled upon or overlooked, or otherwise not contained in the opinion recently issued in the above case.

I.

The Court has failed to consider and pass upon the Respondent's contention which was raised throughout the proceedings in this matter, both before the Board and before this Court, that the Complaint, insofar as it alleged violation of Section 8 (a) (5) of the Act, i. e., refusal to bargain, was barred by the Statute of Limitations contained in Section 10 (b) of the National Labor Relations Act. It is clear that no charge alleging refusal to bar-

gain was filed within six months of the events alleged and found by the Board to constitute refusal to bargain. The Complaint was based upon a charge filed on February 7, 1949,[1] which alleged that the Company had discriminated against certain employees in violation of Section 8 (a) (3) of the Amended Act, by forcing these employees to strike and refusing to re-employ any of them (T. pp. 10-11). It is submitted that, while the charge alleged violation of Sections 8 (a) (1) and (3) of the Act only, the Complaint issued some 18 months after the incidents complained of in the charge occurred, alleged a violation of Section 8 (a) (5) of the Amended Act (refusal to bargain). No charge was ever filed alleging violation of this section of the Act.

It is submitted that Section 10 (b) of the Act prohibits the issuance of a complaint based upon unfair labor practices occurring more than six months prior to the filing of a charge with the Board and service of a copy on the person against whom such charge is made. See *Joanna Cotton Mills v. NLRB*, 176 F. 2d 749, 4th Cir.; *Superior Engraving Co. v. NLRB*, 183 F. 2d 783, 7th Cir., and *NLRB v. Globe Wireless, Ltd.*, 193 F. 2d 748, 9th Cir.

It is further submitted that this Court failed to give consideration to the fact that the Board erred as a matter of law in finding that a charge alleging violation of Sections 8 (a) (1) and (3) was sufficiently broad to inherently include an implication of violation of Section 8 (a) (5). See *NLRB v. Express Publishing Co.*, 312 U. S. 425, affirming 111 F. 2d 588, 5th Cir., and *NLRB v. Remington Rand*, 94 F. 2d 869, 870, 2nd Cir.

II.

For second ground of its Motion for Rehearing and Reconsideration Respondent shows that the Court failed to pass upon or rule upon the contentions of the Respondent that the National Labor Relations Board failed to follow the statutory requirements and procedures required by the National Labor Relations Act, as amended, in connection with the certification of representatives for collective bargaining, as to the determination of the appropriate unit for bargaining and as to the requirement of a secret ballot election by the employees within such unit; both of said statutory requirements being conditions precedent, in this situation, to the

---

[1] The Complaint which for the first time made any mention of any violation of Section 8 (a) (5) of the Act, refusal to bargain, was not issued until November 15, 1949. In that Complaint there is the allegations that the Respondent is alleged to have refused to bargain with the Union in August and September, 1948, more than six months prior to the issuance of the Complaint.

certification of a union and to a requirement that a respondent bargain with a union.

It is submitted that even though a Respondent may express opposition to recognition of a union or to unions, if at the time of the request, or in connection with the request for recognition there are questions raised as to the appropriateness of the bargaining unit for which such recognition is requested; or if there is a question raised as to validity of the claim of majority status of the union; under the terms of the National Labor Relations Act, as amended, and particularly Sections 9 (b) and (c) of said Act; such matters of appropriate unit and majority status must be resolved by determination of the appropriate unit by the Board, after a hearing; and by a secret ballot election among the employees in such appropriate unit, after the appropriateness of the unit has been determined. Moreover, the Board violated the provisions of Section 9 (c) (5) of the said Amended Act in determining the appropriate unit in this matter in the light of the fact that said subsection provides expressly that the extent of union organization is not to be controlling in determining the appropriateness of a unit requested by a Union under Section 9 (b) of the Act.

It is respectfully submitted that the Record in this matter shows that at the time of the Union's request for recognition, the Respondent refused to agree to recognition for the three distinct reasons, which were made clear to the Union, and which appear in the Record in addition to, and independently of, the lack of authority to grant recognition by the Company official upon whom such demand was made. All of the evidence in the Record clearly establishes that these reasons, in addition to lack of authority advanced by the Company, were (a) that the Union did not in fact represent a majority of Respondent's employees; (b) that driver-salesmen were not "employees" as that term is defined in the National Labor Relations Act[1]; and (c) that the appropriate unit was one consisting of all employees, including driver-salesmen (if they were employees) plant employees and all other employees other than supervisors and office clerical employees.

The Record expressly shows that in petitioning for certification with the National Labor Relations Board the Union actually asked for certification in a unit of all employees as set forth in (c) above, and thereafter, some months later, amended that request to limit

---

1. This position as to the driver salesmen was abandoned by the Respondent in the course of the unfair labor practice hearing, which occurred more than a year after the incidents involved, and after the contention was made, in view of subsequent ruling by various U. S. Circuit Courts of Appeals as to independent contractors.

it to driver-salesmen only, and thereafter, withdrew its entire request.

It is clear, we submit, that not only was there a bona fide question on the part of the Respondent as to the appropriate unit, but the actions of the Union, itself, unmistakably establish the bona fides of the question. The Union was inconsistent as to its own position on the unit. At the time the petition was finally amended to limit the unit to driver-salesmen, the Union actually represented no driver-salesmen who were employed by the Respondent. At no time did the employees of the Respondent have an opportunity to make a determination of their desires by a secret ballot election as contemplated and expressly provided for by the National Labor Relations Act, as amended. Moreover, at the time the request for recognition was initially made, the Union did not in fact represent a majority of Respondent's employees. The whole course of action by the Union was a deliberate effort to circumvent the orderly processes provided for by the National Labor Relations Act. This effort was partially ratified and approved by the Board by a determination of the unit in January, 1951, over two years after the events here involved. At no time has the Board directed or conducted an election among such employees as required by Section 9 (c) (1) (last sentence) of the National Labor Relations Act, as amended.

It is respectfully submitted that in this connection the Court has failed to give weight to the express provisions of the National Labor Relations Act contained in Section 9 (b) and 9 (c) (1) and (c) (5) of the Act. See in this connection *Colgate-Palmolive-Peet v. NLRB*, 338 U. S. 355; *Marshall Field Co. v. NLRB*, 135 F. 2d 391, 7th Cir.; *NLRB v. Lovvorn*, 172 F. 2d 293, 5th Cir.; *National Licorice Co. v. NLRB*, 309 U. S. 350.

Wherefore having shown proper cause for reconsideration and redetermination of the matters herein set forth, Respondent prays:

(a) That this Court modify its Decree of enforcement so as to delete therefrom that portion of its Decree directing that paragraphs 1 (a) and 2 (a) of the National Labor Relations Board's Order be enforced; and

(b) That this Court decline to enforce that portion of the Order of the National Labor Relations Board which purports to find this Respondent guilty of refusal to bargain within the meaning of Section 8 (a) (5) of the National Labor Relations Act; and

(c) That the Respondent have such other relief as this Court may deem just and proper.

Respectfully submitted,

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.,

By /s/ FRANK A. CONSTANGY
FRANK A. CONSTANGY,

By /s/ ALBERT B. BERNSTEIN
ALBERT B. BERNSTEIN,
Its Attorneys.

FRANK A. CONSTANGY,
MILDRED McCLELLAND,
1404 Candler Building,
Atlanta 3, Georgia.

ALBERT B. BERNSTEIN,
BERNSTEIN & HODSDON,
Miami, Florida.
Seybold Building,

The undersigned as Counsel for the Respondent do hereby certify that the within Motion for Rehearing and Reconsideration is filed in good faith and in the belief that substantial rights of the Respondent are affected thereby, and that said Motion is not filed for the purposes of delay.

/s/ FRANK A. CONSTANGY
FRANK A. CONSTANGY.

/s/ ALBERT B. BERNSTEIN
ALBERT B. BERNSTEIN.

Date: .....

ORDER DENYING REHEARING.

(Extract from the Minutes of June 18th, 1952.)

NATIONAL LABOR RELATIONS BOARD,

No. 13714, versus

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

CLERK'S CERTIFICATE.
UNITED STATES OF AMERICA.
UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 118 to 140, next preceding this certificate contain full, true and complete copies of the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit in a certain cause in said Court, numbered 13714, wherein NATIONAL LABOR RELATIONS BOARD is petitioner and SEVEN-UP BOTTLING COMPANY OF MIAMI, INC., is respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 117 are identical with the printed record upon which said cause was heard and decided in said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this First day of July, A. D., 1952.

/s/ OAKLEY F. DODD
Clerk, United States Court of
Appeals for the Fifth Circuit.

SEAL

U.S. Government Printing Office 1952 J/215067

No. 13714

United States Court of Appeals for the Fifth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC., RESPONDENT

CERTIFIED COPY OF DECREE

In the United States Court of Appeals for the Fifth Circuit

No. 13714

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC., RESPONDENT

File in Informal File 10–CA–619

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Holmes, Borah and Strum, Circuit Judges,

BY THE COURT:—

This cause came on to be heard upon the petition of the National Labor Relations Board (hereinafter referred to as the Board) to enforce its Order dated January 26, 1951. The Court heard argument of respective counsel on December 3, 1951, and has considered the briefs and the transcript of record filed in this cause. On April 29, 1952, the Court being fully advised in the premises, handed down its decision enforcing, as modified, the said Order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, Seven Up Bottling Company of Miami, Inc., Miami, Florida, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local Union No. 390, as the exclusive representative of the Respondent's driver-salesmen and trainee driver-salesmen;

(b) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local Union No. 390, or in any other labor organization of its employees, by refusing to reinstate any of its employees because

of their union membership or activity or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local Union No. 390, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

2. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act:

(a) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local Union No. 390, as the exclusive representative of all employees in the following appropriate unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement:

All driver-salesmen and trainee driver-salesmen;

(b) Offer to the employees named in "Appendix A", attached hereto, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner set forth in the section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board, dated September 28, 1950, entitled "The Remedy";

(c) Make whole the employees whose names are set forth in "Appendix A", attached hereto, for any loss of pay each may have suffered as a result of the Respondent's discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned from the date of the discrimination, September 16, 1948, to the date of the Respondent's offer of reinstatement, less his net earnings during said period;

(d) Upon request, make available to the National Labor Relations Board, or its agent, for examination and copying, all payroll records, social security payment records, time cards, personnel records

and reports, and all other records necessary for a determination of the amounts of back pay due and the rights of reinstatement under the terms of this Decree;

(e) Post at both its plant and office in Miami, Florida, copies of the notice attached hereto and marked "Appendix B". Copies of the notice, to be furnished by the Regional Director of the National Labor Relations Board for the Tenth Region, Atlanta, Georgia, shall, after being duly signed by the Respondent's representative, be posted by the Respondent, immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(f) Notify the aforesaid Regional Director for the Tenth Region in writing within ten (10) days from the date of this Decree, what steps the Respondent has taken to comply herewith.

(Signed) E. R. HOLMES
Judge, United States Court of Appeals for the Fifth Circuit

(Signed) WAYNE G. BORAH
Judge, United States Court of Appeals for the Fifth Circuit

(Signed) LOUIE W. STRUM
Judge, United States Court of Appeals for the Fifth Circuit

DATED: July 8, 1952.

APPENDIX A

Walter F. Croon
Nat Freeman
Joseph L. Klein
Lawrence T. Nesta
Marvin L. Walls
James P. Yost
Robert D. MacCubbin
T. Shannon
L. Case
Charles F. Fisher
Robert W. Studley

APPENDIX B

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECREE OF THE UNITED STATES COURT OF APPEALS
ENFORCING, AS MODIFIED, AN ORDER

of the National Labor Relations Board, and in an order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, LOCAL UNION NO. 390, or in any other labor organization of our employees, by refusing to reinstate any of our employees because of their union membership or activities or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8(a) (3) of the National Labor Relations Act.

WE WILL, upon request, bargain collectively with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, LOCAL UNION NO. 390, as the exclusive representative of all our employees in the appropriate unit, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All driver-salesmen and trainee driver-salesmen.

WE WILL OFFER to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights

and privileges enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination.

Walter F. Croon	Robert D. MacCubbin
Nat Freeman	T. Shannon
Joseph L. Klein	L. Case
Lawrence T. Nesta	Charles F. Fisher
Marvin L. Walls	Robert W. Studley
James P. Yost	

All our employees are free to become or remain, or to refrain from becoming or remaining, members in good standing of the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

SEVEN UP BOTTLING COMPANY OF MIAMI, INC.

Employer

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

I, OAKLEY F. DODD, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing ..... five ..... pages, numbered from ..... 136 ..... to ..... 140 ....., inclusive, contain a true copy of the DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, ... in the case of

NATIONAL LABOR RELATIONS BOARD
Petitioner

versus

SEVEN UP BOTTLING COMPANY OF MIAMI, INC.,
Respondent

No. 13714

as the same remains upon the files and records of said United States Court of Appeals.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Court of Appeals, at the City of New Orleans, Louisiana, this .... 8th .... day of .... July ....., A.D. 1952.

/s/ Oakley F. Dodd
Clerk, U.S. Court of Appeals
for the Fifth Circuit.

141 Supreme Court of the United States

No. 211, October Term, 1952

[Title omitted.]

Order allowing certiorari

Filed October 13, 1952.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1952

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 217

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

Stipulation

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that, for the purpose of hearing and determining the case on the merits, the *printed* record shall consist of the following:

1. Board's petition for enforcement
2. Order to file petition
3. The charge
4. The complaint
5. The notice of hearing
6. Board's decision and order
7. The Intermediate Report of the Trial Examiner
8. Respondent's exceptions to the Intermediate Report
9. The certificate of the Board certifying the Record to the Court of Appeals.
10. The Court of Appeals proceedings
11. Order of the United States Supreme Court allowing certiorari
12. This stipulation.

It is further stipulated that the record on file in the Supreme Court shall consist of the entire proceedings which were before the Court of Appeals for the Fifth Circuit and on the basis of

which it decided this case. Specifically, the record consists of Volume I, entitled "Transcript of Record", Volume II, entitled "Appendix to Petitioner's Brief", and Volume III, entitled "Appendix to Respondent's Brief", in addition to the proceedings in the Fifth Circuit itself.

It is further stipulated and agreed that counsel may refer in their briefs and argument to the record on file in this Court, including any part thereof which has not been printed.

ROBERT L. STERN
Acting Solicitor General Counsel
for Petitioner

M. A. PROWELL
Counsel for Respondent

November 6, 1952

U.S. GOVERNMENT PRINTING OFFICE 1952—232605/P.O. 7585

RECORD

VOLUME

II

Vol. II

BLACK, J.

No. 217

Office - Supreme Court, U. S.
FILED
JUL 21 1952
CHARLES ELMORE CROPLEY

APPENDIX TO PETITIONER'S BRIEF

UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT.

No. 13,714

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SEVEN UP BOTTLING COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

U. S. COURT OF APPEALS
FILED
AUG 6 1951
Gathy J. Dodd
CLERK

INDEX

	PAGE
Sherman Tobin (for the National Labor Relations Board):	
Direct Examination	6
Cross Examination	25
Re-Direct Examination	27
John J. Lunin:	
Direct Examination	29
Louis M. Baruch:	
Direct Examination	56
Cross Examination	60
Re-Cross Examination	62
Laurence T. Nesta:	
Direct Examination	63
Cross Examination	70
Re-Direct Examination	72
Joseph L. Klein:	
Direct Examination	73
Cross Examination	84
John L. Lunin:	
Cross Examination	87
Re-Direct Examination	93
Re-Cross Examination	94
Further Direct Examination	96
Marvin Leslie Walls:	
Direct Examination	99
James Paul Yost:	
Direct Examination	104
Walter Croon:	
Direct Examination	113
Cross Examination	123
Nat Freeman:	
Direct Examination	125

INDEX—Continued

	PAGE
Francis J. Reilly:	
Direct Examination	130
William J. Treacy (for the Company):	
Direct Examination	147
Cross Examination	148
Charles H. Carnifax:	
Direct Examination	149
Charles Mason Dismukes:	
Direct Examination	153
Cross Examination	159
Clifford Holmes Voight:	
Direct Examination	162
Cross Examination	166
Sherman Tobin:	
Direct Examination	169
Cross Examination	177
Re-Direct Examination	181
G. C. Exhibit #2-A	187
G. C. Exhibit #2-B	191
G. C. Exhibit #3	195
G. C. Exhibit #4	196
G. C. Exhibit #6	197
G. C. Exhibit #7	198
G. C. Exhibit #8	199
G. C. Exhibit #9	200
G. C. Exhibit #10	201
G. C. Exhibit #11	203
G. C. Exhibit #12	204
G. C. Exhibit #13	205
G. C. Exhibit #14	206
G. C. Exhibit #16	207
G. C. Exhibit #17	207
G. C. Exhibit #18	210

INDEX—Continued

	PAGE
G. C. Exhibit #19	211
G. C. Exhibit #20	213
G. C. Exhibit #21	215
Respondent's Ex. #1	216
Respondent's Ex. #2	218

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD

TENTH REGION

Case No. 10-CA-619.

In the Matter of:

SEVEN-UP BOTTLING CO. OF MIAMI, INC.

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, LOCAL UNION NO. 390.

Room 306, Dade County Court House, Miami, Florida, Tuesday, February 7, 1950.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 a. m.

Before: A. Bruce Hunt, Trial Examiner

Appearances:

William M. Pate, Esq., 701 Atlanta National Bldg., Atlanta, Georgia, appearing on behalf of the General Counsel.

Frank A. Constangy, Esq., Candler Building, Atlanta, Georgia, appearing on behalf of Seven Up Bottling Co. of Miami, Inc., the Respondent and

Albert B. Bernstein, Esq., 950 Seybold Building, Miami, Florida, appearing on behalf of Seven Up Bottling Co. of Miami, Inc., the Respondent.

[2] John J. Lunin, 47 N. W. Third Street, Miami, Florida, Secretary-Treasurer and Business Representative, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of American, AFL, Local Union No. 390, the Charging Party.

* * * * * * * *

[7] Mr. Pate:

Then I will ask if the Respondent will acknowledge service of a copy of charge on February 11, 1949.

Mr. Constangy:

Yes, Respondent does so stipulate that it received the charge on February 11. Also, that it received the complaint and notice of hearing in due course.

* * * * * * * *

[14] Mr. Pate:

Mr. Examiner, it is stipulated that on October 26, 1948, a telegram was sent by John J. Lunin of the charging union, addressed to Paul Styles, Regional Director, and that this telegram was received by Mr. Styles on that date reading as follows: "Re Seven Up Bottling Co., 10-RC-370, request permission withdraw petition."

It is stipulated further that Mr. Styles' action on this request embodied in this telegram is contained in a pen notation appearing at the bottom of the telegram, reading as follows: "Approved 10-26-48, Paul L. Styles."

It is stipulated further that under date of October 27, 1948, a letter was sent by Mr. Styles, the Regional Director, to the Respondent, with a carbon copy to the charging union, reading as follows: "Re Case No. 10-RC-370. Gentlemen: This is to advise you that the petition in the above entitled [15] matter has, with my approval, been withdrawn by the petitioning union."

On behalf of the General Counsel I am willing to enter into that stipulation.

Trial Examiner Hunt:

Do you gentlemen intend that stipulation, insofar as the ruling of Mr. Styles is concerned, to have been a ruling on both the petition and the amended petition which has been marked as Exhibit 2-A and -B?

Mr. Pate:

Yes.

Mr. Constangy:

Yes.

Trial Examiner Hunt:

And do you agree to that stipulation, Mr. Lunin?

Mr. Lunin:

Yes.

* * * * * * * *

[21] Trial Examiner Hunt:

* * * * * * * *

I do understand from the statements of counsel that they are in agreement on one matter at least, namely that there were requests that the employer recognize the union.

Mr. Constangy:
Yes.

* * * * * * * *

[21] Mr. Pate:
This pertains, Mr. Examiner, to the Respondent's business operations and I will call attention to the fact that paragraphs one and two of the complaint are admitted in the answer, and this stipulation is intended to supplement the allegations of those paragraphs and of paragraph three, which is admitted in part.

It is stipulated that during the calendar year 1949, which period is representative of all times material to this proceeding, the Respondent made purchases of bottles, crowns, syrup, advertising materials, refrigeration materials and [22] machinery parts from points outside the State of Florida in the amount of $81,975.44. All of these supplies, material and equipment represented by this figure were purchased at points outside the State of Florida, and shipped to the Respondent inside the State of Florida. During the same period, the Respondent made purchases within the State of Florida in the amount of $63,643.44. During the same period, its sales were $323,284.46, all of which were made within the State of Florida.

Of the figure given for purchases outside the State of Florida, approximately $20,000 represents

syrup purchased by the Respondent from St. Louis, Missouri, and shipped in interstate commerce to the Respondent at Miami, Florida. The other purchases made outside the State of Florida were made at Atlanta, Georgia; Baltimore, Maryland; Detroit, Michigan; Chicago, Illinois; and Toledo, Ohio.

Trial Examiner Hunt:
Does that complete your stipulation?

Mr. Pate:
That completes the stipulation.

Mr. Constangy:
We so stipulate, sir.

Trial Examnier Hunt:
I wonder if paragraph three of the complaint, and that portion of the Respondent's answer dealing therewith, should be interpreted to mean that you gentlemen are in agreement that during the calendar year of 1948 the Respondent purchased raw materials and supplies [23] consisting principally of syrup, bottles, caps, containers, but not sugar, valued in excess of $100,000, more than 60 per cent of which was purchased from points outside the State of Florida.

Mr. Constangy:
That is right.

Mr. Pate:
It is my understanding that the figures shown in paragraph three are only approximate. You will note that the purchases are valued according to the complaint in excess of $100,000, and it is my understanding that the figures that we have stipulated upon

for the year 1949 actually should be taken as representative of both years, 1948 and 1949, in preference to those shown in paragraph three of the complaint.

Trial Examiner Hunt:

If that is the understanding of you gentlemen, that is quite all right.

Mr. Constangy:

It is all right. I think your observation about the complaint is also correct. We have not disputed generally the allegation in paragraph three, except insofar as the sugar is concerned.

Trial Examiner Hunt:

I will accept the understanding of counsel as stated by Mr. Pate to be embodied in the stipulation of counsel supplementing the allegation with respect to the commerce aspects of the business.

* * * * * * * *

[25] SHERMAN TOBIN, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * * * * *

Direct Examination.

(By Mr. Pate):

Q. Mr. Tobin, you are connected with the Seven Up Bottling Company of Miami, are you not?

A. Yes, I am.

Q. In what capacity?

A. Well, I am secretary-treasurer of the corporation.

Q. And how long have you held that position?

A. That has been since April 1, 1948.

Q. Since April 1, 1948?

A. Yes.

Q. Can you tell us who the other officers of the corporation are?

A. Yes. Mr. A. J. Tobin, president, and Mrs. Rebecca Tobin, vice president.

Q. There are no other officers other than you three?

[26] A. No other officers.

Q. Mr. A. J. Tobin was president during the year 1948 and at all times since then, is that correct?

A. The business was incorporated April 1, 1948.

Q. And since the incorporation the officers have remained the same?

A. Yes, that is correct.

Q. Mr. Tobin, the company maintains a bottling plant in Miami, that is correct, isn't it?

A. That is right.

Q. And it also has an office in Miami?

A. That is right.

Q. Can you tell us whether the office is located in the same place with the bottling plant?

A. No. The office is located at 1655 North Miami Avenue, and the factory is located at 3730 North Miami Avenue.

Q. Approximately what distance is there between the office and the factory?

A. Approximately three-quarters of a mile.

Q. Mr. Tobin there is a Mr. Dismukes employed by the company, is there not?

A. Yes, there is.

Q. Can you tell me what his position is now?

A. Mr. Dismukes' capacity is that of sales manager.

Q. Sales manager?

[27] A. Yes.

Q. Did he have the same capacity in 1948 and 1949?

A. Yes, he did.

* * * * * * * *

Trial Examiner Hunt:

Do you have in mind by this line of inquiry the question as to whether he is a supervisory employee for whose conduct the Respondent would be responsible?

Mr. Pate:

We do.

Mr. Constangy:

If he does, we will so stipulate.

* * * * * * * *

[28] (By Mr. Pate):

Q. Mr. Tobin, can you tell us just what the operation in general at the company's plant is?

A. The operation of the business entails the manufacture and distribution of our product, which is 7-Up.

Q. The drink is made and bottled at the plant, is that correct?

A. It is made and distributed, locally.

Q. How is the 7-Up distributed?

A. It is distributed by the company. The company has complete charge of all distribution in Miami.

Q. And is it distributed by trucks principally?

A. Yes, it is.

Q. And that was true in 1948—at all times during that year?

A. It has been the way since the beginning of the business.

Q. And it is sold from trucks by driver-salesmen employed by the company?

A. That is correct.

Q. Do you sell any in any other way?

A. There are a few local plant sales, direct from the factory to wholesalers.

Q. And is the 7-Up sold in that manner delivered by the same trucks?

A. No, it is picked up locally. That is, it is picked up at the plant.

[29] Q. Would that be only a very small part of the total business?

A. Yes, it would be a minor part.

Q. And would that have been true in 1948 also?

A. That is right.

. . . . . .

[31] (By Mr. Pate):

Q. Mr. Tobin, during the year 1948, did each employee working in the plant in manufacturing operations have a clearly defined job, or did they all do generally the same thing?

A. No, all the jobs in the plant are related to sales.

Q. You say all jobs related to sales?

A. In the plant. All are related to production and sales.

Q. Well, referring now to the jobs involved in the production, can you tell us just what particular jobs you had in the plant at that time?

A. Do you mean by that individual employees—what jobs they held?

Q. I am not asking you to identify any employee with a job.

A. I see.

Q. Just tell me what the jobs were in general.

A. The jobs in the plant generally are putting the empty bottles into the equipment to be filled, and manufactured and capped, ready to go out for sale.

Q. And that work was done by all employees working in the manufacturing operation?

A. That is right.

Q. The bottles were filled and capped by machine in the [32] plant, is that correct?

A. That is correct.

Trial Examiner Hunt:

Did some of the employees work in connection with cleaning the bottles before they were placed on a conveyor to be filled with the drink?

The Witness:

The machinery is completely automatic, but there are employees who have to tend to the machinery, putting the bottles in the machinery and taking them out.

Trial Examiner Hunt:

For the purpose of cleaning the bottles?

The Witness:

Cleaning and filling.

Trial Examiner Hunt:

Both for the purpose of cleaning the bottles and filling them with the drink?

The Witness:

That is correct.

Trial Examiner Hunt:

All right.

(By Mr. Pate):

Q. Did each employee at that time work on all those operations, or were they divided up among the employees?

A. No, each employee worked on all operations. They are changed around from one location to another location. I might state that the reason for the changing of location is because they are tedious jobs. It is necessary to change them because one man might become tired if he were to remain long on one specific job.

Q. Now, in 1948 did the Seven Up Bottling Company own the trucks that were driven by the driver-sales men?

[33] A. Yes, the Seven Up Bottling Company has always owned its own trucks.

Q. And did it make assignments of particular routes to each driver-salesman?

A. Yes. Each driver-salesman has a route number.

Q. Each driver-salesman has a route number?

A. Yes.

* * * * * * * *

[35] Q. I am not asking now for a detailed statement of the computation of the pay of any employee, but merely the basis on which they were paid, if you know that.

A. Well, there is a different classification between salesmen, truck salesmen, trainees, supervisors, and all other employees.

Q. Tell us what you mean by a trainee.

A. A trainee is a man who is being trained for an outside job.

Q. On one of the trucks as a driver-salesman?

A. A man who is being trained in the plant or outside.

Q. If he is a trainee driver-salesman he would be trained for a job as a drivers-salesman, would he not?

A. Not necessarily at the beginning.

Q. What is he being trained for?

A. He would be trained in the sale of 7-Up. The first thing [36] a man is trained for—well, to start with he is trained in the plant on how our product is made. After he knows what our product is, then he is put outside on the trucks.

Q. My question is, Is a trainee driver-salesman being trained for a job as a driver-salesman?

A. Yes, he is, eventually.

Q. And how long does he generally spend as a trainee driver-salesman before he becomes a driver-salesman?

A. That depends entirely upon the capabilities of the man, but I can estimate four weeks.

Q. Four weeks on the average?

A. That is correct.

Q. And during those four weeks he is paid on a salary basis?

A. That is correct.

Q. When he becomes a driver-salesman, he is paid on a combination salary and commission basis, is that correct?

A. Yes, he is.

Q. And that was true during the year 1948?

A. That is right.

* * * * * * * *

[37] (By Mr. Pate):

Q. Mr. Tobin, during the year 1948, each driver-salesman was paid a commission of seven cents a case, is that correct?

A. That is right.

Q. In addition to that, he was paid a salary of twelve dollars a week, is that correct?

A. That is right.

Q. Was the twelve dollars a week paid as compensation for any particular service that they rendered?

A. No, it was not.

Q. That was just part of their over-all pay?

[38] A. Part of their over-all sales pay.

* * * * * * * *

Q. Was there during the year 1948 any set time for driver-salesmen to report for work in the morning?

A. The set time since the incorporation of our business has [39] been seven o'clock.

Q. And did the trucks go out at seven o'clock in the morning, or did they go out within a short time after seven o'clock in the morning?

A. Within a short time. Between seven and seven-thirty.

Q. They would load their trucks in that time?

A. No, that is incorrect. The trucks were loaded the previous evening.

Q. The trucks were loaded the previous evening?

A. Yes.

Q. And then how were the hours of work set during the day, after they began work? What determined how long each man would work?

A. How long was necessary for the man to finish his route.

Q. He worked until he finished his route?

A. That is correct.

Q. Mr. Tobin, does the company have any particular geographical area that it covers in its operations?

A. Yes, we do.

Q Can you tell us what that is?

A. Our area covers Dade, Broward and Monroe Counties.

Mr. Constangy:
Florida.

The Witness:
Florida.

(By Mr. Pate):

Q. You have that territory assigned to the company through a franchise of some kind?

[40] A. Yes, we do. That is correct.

Q. And by whom is that franchise granted?

A. That franchise is granted by the Seven Up Company, St. Louis, Missouri.

Q. Is your company the exclusive seller of 7-Up in that area?

A. Yes, we are.

Q. And under your franchise you are given the exclusive right to sell in that territory?

A. That is correct.

Q. Mr. Tobin, does the Seven Up Bottling Company of Miami manufacture any syrup at the Miami plant?

A. No, we do not.

Q. Where is the syrup made?

A. Our syrup is purchased from the Seven Up Company, St. Louis, Missouri.

Q. And all of it is made up there?

A. I assume so.

Q. At least that is where you get it?

A. That is correct.

Q. Does the company in Miami do any advertising of its own?

A. Yes, the company does all of its own local advertising.

Q. And will you tell us what you mean by local advertising?

A. That would mean radio, newspaper, billboard, television, and other local forms and media.

Q. Are all those means of advertising that you have just [41] named actually used by the company in Miami?

A. Yes, they are.

Trial Examiner Hunt:

Off the record.

(Discussion off the record.)

Trial Examiner Hunt:
On the record.

(By Mr. Pate):

Q. Then other advertising is done by the 7-Up Company in Missouri—St. Louis—isn't it?

A. The national advertising is done by the 7-Up Company in St. Louis.

Q. Do you know what means of advertising the 7-Up Company uses in its national advertising?

A. They use magazine advertising exclusively.

Q. And does your company pay a certain part of the cost of the national advertising?

A. They pay all of the cost.

Q. Your company in Miami pays all of the cost of the national advertising?

A. No. The Seven Up Company in St. Louis, which is different from the Seven Up Bottling Company of Miami. The Seven Up Company in St. Louis pays the advertising cost in the magazine advertising.

Q. And is a charge then made to the local company for a certain part of the cost of the national advertising?

A. The charge is made—well, we pay one charge for syrup, which is extract, which is the essence of our drink. We pay [42] We pay one charge for our extract from St. Louis, Missouri. That is included in the extract charge.

Q. You mean the advertising cost is included in the extract charge?

A. There is one charge for extract.

Q. Do you know a Mr. Charles Carnifax, who has been employed by the company?

A. Yes, I do.

Q. Is he employed there now?

A. Yes, he is.

Trial Examiner Hunt:

Let's have the spelling of that name.

Mr. Pate:

C-a-r-n-i-f-a-x.

(By Mr. Pate):

Q. Was he employed there at all times during the year 1948?

A. Yes, he was.

Q. Now, Mr. Tobin, can you tell us what his job was during the year 1948?

A. Mr. Carnifax's job classification is that of supervisor.

Q. And is that the entire classification?

A. Yes.

Q. Can you tell us what he supervised?

A. He supervised sales of the men he was assigned to.

Trial Examiner Hunt:

What's that?

The Witness:

He supervised sales of the men he was [43] assigned to.

(By Mr. Pate):

Q. Was he assigned to a certain number of the driver-salesmen?

A. Yes, he was.

Q. And during that same period, 1948, did Mr. Dewey Chapman occupy the same position?

A. Mr. Chapman had the job of supervisor also.

Q. Did he have another group of routes under his particular supervision?

A. Yes, he did.

* * * * * * * *

[44] Mr. Pate:

I believe there is a pending question. I believe I had just asked the general nature of the duties and responsibilities of Mr. Carnifax and Mr. Chapman during the year 1948.

The Witness:

Yes. The duties of both these men are fixed by the sales manager, who is responsible to management.

(By Mr. Pate):

Q. Do you know what they were?

A. They were responsible for sales.

Q. Can you give us a more detailed description of what they did?

A. They contact problem customers, accounts that are slow in purchasing, seeing that the trucks are in running order, increasing sales.

Q. When you say they see the trucks are in running order, you mean they check them mechanically?

A. No, they don't.

Q. Well, what do you mean by that?

A. I mean if a salesman turns in a report that the truck is [45] broken down or ailing, they will see to it that someone is notified that it be repaired, which is usually the sales manager.

Q. During the year 1948, did the two supervisors, Mr. Carnifax and Mr. Chapman, go with the driver-salesmen at particular intervals on their routes?

A. They rode on the trucks.

Q. And do you know what they did when they made the rounds with the salesmen?

A. As I stated before, their job is to increase sales, and that is just what they did whenever they rode the truck, to the best of their capacity.

Q. Did they give instructions and make suggestions to the particular driver-salesmen about methods of increasing their sales?

A. Well, they were helpful. They tried to help in training the salesmen on the truck.

Q. Did they make reports either to you or to Mr. Dismukes about the performance of driver-salesmen?

A. Their performance was discussed with Mr. Dismukes.

Q. By the two route supervisors?

A. That's right.

* * * * * * * *

[47] Q. During the year 1948, was there any interchange of employees between the trucks and the plant?

A. Could you define that a little more completely?

Q. Did the employees working on the trucks also spend any part of their time in the manufacturing operations?

A. No, not if they were on the trucks.

Q. That was a full-time job?

A. That is correct.

Q. And a man who worked in the manufacturing plant would spend all his time there?

A. No, that is not right.

Q. Will you tell me what is correct?

A. I will try. The men inside the plant fill the bottles, as has been stated before; they loaded them on the platforms, and took them to the back of the plant where they were loaded on to truck. As another part of their duties, they also repaired cases that were broken on the outside, painted cases, [48] restenciled them, and other duties.

Q. But the men that were engaged in those duties in and about the plant did not also drive trucks part of the time?

A. They did not drive trucks.

Q. I notice you emphasize the word "drive". Will you explain what you mean by that?

A. I didn't mean to emphasize it. They did not drive sales trucks.

Q. I see: Mr. Tobin, are you personally acquainted or were you personally acquainted with the driver-salesmen who were working for the company in August or September of 1948?

A. Yes, I knew all of my employees personally.

* * * * * * * *

[49] (By Mr. Pate):

Q. Mr. Tobin, I will show you Appendix A to the complaint, which is in evidence as General Counsel's Exhibit 1-B, and ask you if the men whose names are listed there were all employed as driver-salesmen immediately before September 7, 1948.

A. All the men listed here were employees of the Seven Up Bottling Company at the time, but all of them were not driver-salesmen.

Q. Will you tell us the ones who were not driver-salesmen?

A. I would have to check my records. I believe the records have been in evidence.

Q. I will ask you if you are referring to the fact, or if you have in mind the fact that some of them might have been trainee driver-salesmen.

A. Yes, that is correct.

Q. Were all the men listed here either driver-salesmen or trainee driver-salesmen?

A. Yes, that is correct.

Trial Examiner Hunt:

Is that intended to be a full and complete list of driver-salesmen and trainee driver-salesmen?

Mr. Pate:

It is not, and I am going to pursue that with the witness.

* * * * * * * *

[50] (By Mr. Pate):

Q. Mr. Tobin, do you know whether there were any driver-salesmen or trainee driver-salesmen working in September 1948?

A. I would have to check my pay roll sheet to answer that question.

Q. Other than the ones listed on Appendix A (handing to witness)?

A. That was on September 8.

Q. Well, immediately before September 7?

A. Yes, there were others listed who are not on Appendix A.

Q. Will you tell us who the others were?

A. C. Voight, G. Wood, R. Nelson.

* * * * * * * *

(By Mr. Pate):

Q. Now, with the help of the record that you have before you, can you tell us which of the employees listed here on Appendix A were not driver-salesmen?

A. I would have to check some other records for that also—[51] the pay roll sheets. I believe my classification of not driver salesmen is C. Fisher, L. Case.

Trial Examiner Hunt:

Just a moment, Spell it.

The Witness:

C-a-s-e. L. Nesta, N-e-s-t-a, and R. Studley, S-t-u-d-l-e-y.

* * * * * * * *

[53] (By Mr. Pate):

Q. Mr. Tobin, you remember that on September 7, 1949, a number of the driver-salesmen did not go to work?

A. That is correct.

Q. And do you know that all the employees listed on Appendix A to the complaint were in the group who did not report for work that day?

A. The employees listed in Appendix A were a portion of the employees who did not report for work.

[54] Q. But all of these listed on Appendix A did not report for work?

A. Yes, that is understood.

Q. And there were some others—some other driver-salesmen—who did not report for work?

A. That is correct.

Q. As a matter of fact, Mr. Voight, whom you have already named, did not work that day either, did he?

A. Mr. Voight did not work, and a few others that I have named.

Q. And Mr. Wood?

A. Mr. Wood did not work that day. Mr. Wood was away on leave.

Q. Mr. Wood was away on leave, but Mr. Voight had been working up to the day that the strike started?

A. That is right.

Q. And Mr. Nelson did report for work that day?

A. Mr. Nelson did report for work.

Q. Consequently, Mr. Nelson was the only driver-salesman who reported for work that day, September 7?

A. That is correct.

Q. And since that time, how many of the driver-salesmen who did not come to work on September 7, 1948 have returned to work for the company?

A. Mr. Voight, Mr. Wood—Sorry. Strike that. Mr. Voight [55] returned to work and Mr. Wood returned from leave.

Q. Mr. Voight returned to work during the first week of the strike, is that correct?

A. Would you mind setting down the date?

Q. I don't know what date it was, but you say the strike began on September 7, 1948.

* * * * * * * *

A. Mr. Voight returned to work on the following Monday. Let me check that date on the calendar.

Mr. Constangy:

September 13.

The Witness:

September 13.

* * * * * * * *

[56] (By Mr. Pate):

Q. Since September 7, 1949 has the company offered jobs to any of the driver-salesmen who failed to

[57] report to work on September 7, 1948, other than Mr. Voight and Mr. Wood?

A. The company did not offer jobs to anyone. The jobs were there, available.

Q. And it has not since that time offered jobs to any of the driver-salesmen who went on strike at that time?

A. Mr. Voight reclaimed his job. He was on strike. Mr. Wood returned to work. Mr. Nelson remained with the company.

Q. You have named those three. I now want to refer to the others—not those three. Has the company offered jobs to any of the other driver-salesmen who did not report for work on September 7, 1948?

A. What do you mean by offered jobs?

Q. Just that.

A. Do you mean that I personally went out and said "The jobs are open" to the men? Is that the meaning of your question?

Q. I mean either by that means or by any other means, has the company communicated with these employees, these men, and offered them jobs with the company?

A. I have never communicated with any of them. Mr. Tobin, Sr. has not communicated with any of them. Mr. Dismukes has not communicated with any of them and offered them jobs.

Q. And no one else in the company would ever have thought of doing it, would they?

[58] A. As far as I know, in my mind—I don't know what you are driving at particularly—but I did not personally go out and offer jobs to anyone. The jobs were there, as far as I knew.

Q. You did not do it; and you said that Mr. A. J. Tobin did not do it.

A. Mr. A. J. Tobin was not in Miami.
Q. And consequently he did not do that?
A. That is right.
Q. And Mr. Dismukes did not do that?
A. That is correct.
Q. Now my question is—
A. Mr. Carnifax did not do that. Mr. Chapman did not do that, or any other employee, as they were not in authority to do so.

. . . . . .

[63] Mr. Constangy:

Mr. Examiner, this charge was filed under the current issue of the Rules and Regulations of the Board, which is Series 5, amended on August 18, 1948. Section 203.12(d) requires that a charge contain a clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce.

This charge on its face purports to deal with two things: one, 8(a) (1), and two, refusal to reinstate persons who were on strike, which is a straight 8(a) (3) charge. There is no allegation herein of refusal to bargain or refusal to deal with [64] the union, nor is there any allegation specifically of one which an amendment could make at this time to support that allegation.

. . . . . .

[67] Cross Examination.

(By Mr. Constangy):

Q. Mr. Tobin, you stated on direct examination that the title of Mr. Carnifax and Mr. Chapman was supervisor. Isn't that title actually route supervisor?

A. That is what they actually are called, yes—route supervisors.

Q. Route supervisor rather than just supervisor?

A. Yes. That defines what they are doing—what their title is.

Q. Each of them has a certain number of men or a certain number of routes assigned to them, is that right?

A. That is correct. Each one has approximately six.

Q. You say each one has approximately six?

A. Yes.

Q. And they are divided geographically, is that right?

A. That is correct.

* * * * * * * *

[68] Q. How long have you been with the Seven Up Bottling Company?

A. I have been with the company since early 1946, when I left college.

* * * * * * * *

[71] Q. What is the duty and function of the employee known as the mechanic?

A. The mechanic's duty is to keep the trucks in running order.

* * * * * * * *

Q. Do you have an employee known as a refrigeration man?

A. Yes.

Q. What are his duties and functions?

A. To keep all refrigeration equipment—vending machines which dispense our product—in working order.

Q. Is his work performed in or out of the several offices or plants of the company?

A. The majority of his work is performed outside, keeping the equipment in running order.

* * * * * * * *

[72] Q. Do you have an employee or employees known as advertising men?

A. Yes, we do.

Q. What do they do?

A. The advertising man's responsibility and job is to place outside advertising throughout the territory that we service.

Q. Is there any connection between their function and that of the driver-salesmen?

* * * * * * * *

[73] Q. Is that advertising material placed in part in the plants or the stores or the locations of customers of the driver-salesmen?

A. The majority of it is placed outside and inside the locations of customers—stores.

* * * * * * * *

[74] Re-Direct Examination.

* * * * * * * *

[75] Q. You don't remember approximately how long it was before you had men assigned to those trucks?

A. I would have to see my records. They will show exactly what I've got. They will show when the men were assigned to the trucks.

Q. Do you have a recollection yourself, independently of the record?

A. Yes, I do.

Q. That is what I am asking for.

[76] A. My men were assigned to the trucks starting—may I see a calendar?

Mr. Constangy:

Here you are (handing to witness).

The Witness:

My men were assigned to the trucks on the following dates: September 9, September 10, and September 11.

* * * * * * * *

[77] Q. How did you train the men who replaced the striking driver-salesmen and took the trucks out on September 13, 1948?

A. Those men were given an intensive training session at Mr. A. J. Tobin's home on the evenings of September 9, 10, and 11, and the afternoon of September 12.

* * * * * * * *

[78] JOHN J. LUNIN a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified [79] as follows:

Direct Examination.

(By Mr. Pate):

Q. Will you give us your full name and address, Mr. Lunin?

A. John J. Lunin, L-u-n-i-n. 47 North West Third Street, Miami, Florida. Do you want my home address too?

Q. That's good enough, I think. Mr. Lunin, what is your occupation?

A. Secretary-treasurer and business manager, Local 390, International Brotherhood of Teamsters.

Q. That is the union that filed the charge in this case, is that correct?

A. Yes, sir.

* * * * * * * * *

[80] Trial Examiner Hunt:

Excuse me. Mr. Constangy, do you question that Local 390 of the Teamsters is a labor organization?

Mr. Constangy:

No. At the time we filed our answer we were without knowledge of it. I am perfectly willing to enter into a stipulation, in light of the witness' testimony.

Mr. Pate:

We are willing to stipulate.

* * * * * * * * *

(By Mr. Pate):

Q. Mr. Lunin, in your capacity as business manager and an officer of Local 390 of the Teamsters Union, have you ever done any organizational work

among employees of [81] the Seven Up Bottling Company of Miami?

A. I have.

Q. When did you have your first contact with employees of that company?

A. Around the early part of August of 1948.

Q. With whom did you have your first contact?

A. With Mr. Nat Freeman.

Q. Was he an employee of the company at that time?

A. He was.

Q. Did you contact him or did he contact you?

A. He contacted me.

Q. In what way?

A. By telephone.

Q. Did he state why he was calling?

A. Yes.

Q. What was the purpose?

A. For the purpose of organizing the driver-salesmen employed by the Seven Up Bottling Company.

Q. After that did you have any personal conference with Mr. Freeman?

A. I did.

Q. When was that?

A. That was about a week later, at my office.

Q. Was anyone else there at that time besides you and Mr. Freeman?

[82] A. No, sir.

Q. Did you have a further discussion about organization with him then?

A. I did.

Q. Did you give him any application cards?

A. I did.

Q. Were they blank cards?

A. Yes, sir.

Q. After that time, did you have any—Strike that. Did you attend any meeting of employees of the Seven Up Bottling Company?

A. I did.

Q. When was the first meeting that you attended?

A. It was about a day or two after I met him the second time, in August.

Q. This was in August 1948?

A. Yes.

Q. Where was that meeting held?

A. At the Laundry Workers Hall on Miami Avenue and 35th Street.

Q. And who attended that meeting?

A. Frank Reilly, myself.

Q. Just a minute. Will you tell us please who Frank Reilly is?

A. Frank Reilly is the president of our local union.

[83] Q. Was he president at that time?

A. Yes.

Q. Go on.

A. And about five employees of the Seven Up Bottling Company—driver employees.

Q. About five, you say?

A. Yes. Five or six—something like that.

Q. Were any employees there other than employees of the Seven Up Bottling Company?

A. No, sir.

Q. Can you tell us generally what business, if any, was taken up at that meeting?

A. Yes. They put certain questions to me pertaining to affiliations.

Mr. Constangy:

I'm sorry. Would you speak just a little louder, Mr. Lunin. I can't hear you.

The Witness:

They've always told me I've got a loud voice.

Trial Examiner Hunt:

Try to speak a little louder.

The Witness:

They questioned me pertaining to the proper procedure to be followed in affiliating with my local, and I told them what the proper procedure would be. I told them about these cards—that they had to be filled in and that their authentic signature would have to be put on them in order for us to have them for our record.

[84] (By Mr. Pate):

Q. Had you received any signed cards at that time?

A. I received a few of them, but we called for another meeting.

Q. Was there any other business taken up at that meeting, other than the general discussion that you have described?

A. No, sir.

Q. Did you have another meeting after that time?

A. I did.

Q. Approximately how long after the first meeting?

A. About a week later.

Q. About a week later?

A. Yes, sir.

Q. Where was that meeting held?

A. At the same place.

Q. Who attended it?

A. The same employees. About three more men came in at that time—three or four more men.

Q. You mean three or four more Seven Up employees?

A. Yes.

Q. And were you there?

A. Yes, sir.

Q. And Mr. Reilly?

A. Yes, sir.

Q. Is that everyone who was there now?

[85] A. Yes, sir.

Q. What business did you take up at that meeting?

A. I discussed the law with them, and I told them in order for me to qualify their unit as a bargaining unit, I must have better than 51 per cent of the employees under my jurisdiction, such as driver-salesmen.

Q. Had you at that time received any more cards?

A. I did.

Q. Signed cards?

A. I did.

Q. Was the question of recognition from the company discussed at that meeting?

A. It was.

Q. Had you at any time before that meeting made any effort to contact the company?

A. No, sir.

Q. Did you make any statement to the employees at that meeting about your plans in that respect?

A. I did.

Q. What did you state?

A. I told them that I would make every effort to contact the employer. Not knowing his name, they gave me his name.

Q. Was any other business taken up at that particular meeting that you remember?

A. No, sir.

[86] Q. What about the payment of initiation fees, was that taken up then?

A. We did discuss at the first meeting how much the initiation fee would be. I told them, and they accepted it.

Q. Were any other meetings held after that time?

A. Yes, sir.

Q. About how long after was the next meeting held?

A. A couple of days after that.

Q. A couple of days after the second meeting?

A. Yes, sir.

Q. At any time between the second meeting and the meeting held a couple of days later, did you make any effort to contact the company?

A. Yes, sir.

Q. When did you make your first effort to contact the company?

A. I made the first effort to contact the company by personal appearance at the Miami office on Miami Avenue and Seventeenth Street.

Q. Approximately when was that done?

A. That was about, I believe, the next day after the meeting.

Q. After the second meeting?

A. Yes, sir.

Q. And did you go there to the office?

A. I did.

[87] Q. Was anyone with you when you went?

A. No, sir.

Q. Did you enter the office?

A. Yes, sir.

Q. Did you see anyone there or talk to anyone?

A. Yes, sir.

Q. Whom did you see?

A. I saw a young lady sitting inside the rail, and I spoke to her and asked for Mr. Tobin.

* * * * * * * *

[88] (By Mr. Pate):

Q. Will you tell us what conversation you had with her?

A. I asked if Mr. Tobin was in. She said, "What do you wish to see him about?" I gave her my card and introduced myself.

Q. Did she have anything to say then?

A. She said Mr. Tobin wasn't in but that he was expected in around 9:30.

Q. What time was it when you called?

A. It was a little after nine.

Q. Did you have anything else to say?

A. I waited for Mr. Tobin.

Q. You waited for him?

A. Yes, sir.

Q. How long did you wait?

A. I waited about an hour.

Q. Did he come in while you were there?

A. No, sir.

Q. Did you leave then?

[89] A. Yes, sir.

Q. Did you have any further conversation with anyone present there before you left?

A. Yes, with the lady.

Q. What other conversation did you have with her?

A. I told he, "I will contact Mr. Tobin again, and if at all possible, I'd appreciate a call from Mr. Tobin for an appointment."

Q. What did she say?

A. She said she'd deliver my message.

Q. Did you give her your telephone number?

A. My telephone number was on the card.

Q. Did the card also contain the name of the labor organization you were with?

A. Yes, sir.

Q. And your position?

A. Yes, sir.

Q. After that did you receive a call from Mr. Tobin?

A. No, sir.

Q. Did you make any further effort to contact him?

A. Yes, sir.

Q. What did you do next in your effort to contact him?

A. I called for Mr. Tobin.

Q. Approximately when was that?

A. I called the next day.

[90] Q. Was that by telephone?

A. Yes, sir.

Q. Did you talk with him?

A. No, sir.

Q. With whom did you talk?

A. Again with someone in the office. I believe this time it was a man. I'm not sure, but I think it was a man.

Q. Had you dialed the office number?

A. I did.

Q. Tell us just what the conversation was on that particular occasion.

A. I said that I had left my card yesterday, and for Mr. Tobin to please call me, and could I talk to him please. He said he wasn't in. I said, "Well, will you please have Mr. Tobin call me, if possible? It's very important."

Trial Examiner Hunt:

Am I to assume that the witness, in referring to Mr. Tobin, is referring to the president of the corporation?

The Witness:

No, sir. I am referring to this gentleman here (indicating Mr. Sherman Tobin).

Trial Examiner Hunt:

All right.

(By Mr. Pate):

Q. It was Mr. Tobin, Jr. you were trying to see?

A. That is right, Mr. Tobin, Sr. was out of town at the time.

[91] Q. You had received the information that he was out of town?

A. Yes, sir.

Q. All right. Tell us what the rest of that conversation was.

A. That's all there was to that conversation. I asked for him to please call me—it was very important.

Q. And you say you think it was a man that you talked to on that occasion?

A. Yes, sir.

Q. But you are not sure?

A. Yes, sir.

Q. Did you receive a call from Mr. Tobin after that?

A. No, sir.

Q. Did you make any further effort to get in touch with him?

A. Yes, sir.

Q. What did you do next?

A. I went back to the plant the next day—rather to the office. I did that the next day.

Q. Now, Mr. Lunin, was this call at the office that you are referring to now before your third union meeting?

A. Yes, sir.

Q. Of Seven Up employees?

A. Yes, sir.

[92] Q. What time of day did you go back?

A. In the morning. Nine o'clock.

Q. Did you see Mr. Tobin on that occasion?

A. Yes, sir.

Q. Where did you see him?

A. At his office.

Q. At his office?

A. Yes, sir.

Q. Was anyone with you when you went there?

A. I was alone.

Q. And did you have a conversation with Mr. Tobin in his office?

A. Yes, sir.

Q. Was anyone present except the two of you?

A. I believe there was someone who was looking at the books. I don't know if it was a bookkeeper or what, but it was some gentleman.

Q. Did anyone else participate in the conversation other than you and Mr. Tobin?

A. No, sir.

Q. Will you relate for us that entire conversation, as you remember it, telling what you said and what he said?

A. I presented another card to Mr. Tobin so he would know who I was, and I told him that I represented a majority of his driver employees, and that I would like to talk to him with [93] reference to recognition.

Q. Go ahead.

A. And he said he wasn't interested, and that he was a little busy. That was the entire conversation. I asked him if I could meet with him again. He said "Try".

Q. He said what?

A. "Try".

Q. Is that all that was said?

A. That's all.

Q. Did you leave at that point?

A. Yes, sir.

Q. Did you make any further effort to get in touch with Mr. Tobin?

A. I did. I sent him a letter.

Q. Was that letter sent before the third union meeting, or after?

A. That was sent before the third union meeting.

Trial Examiner Hunt:

Off the record a moment.

(Discussion off the record.)

Trial Examiner Hunt:

All right. On the record.

(By Mr. Pate):

Q. Mr. Lunin, did you keep a copy of the letter that you sent to Mr. Tobin at that time?

A. I did.

Q. Did you send that by regular mail or registered mail, or how?

[94] A. The first letter I sent by regular mail.

Q. I will show you a paper that purports to be a copy of a letter addressed to Mr. Tobin, Seven Up

Bottling Company, purporting to be from John J. Lunin, dated August 19, 1948, and ask you if that is a copy of the letter to which you refer.

A. Yes, sir.

Mr. Pate:

I will ask that the document which the witness has just identified be marked as General Counsel's Exhibit 3 for identification.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3 for identification.)

(By Mr. Pate):

Q. And did you mail that letter to Mr. Tobin?

A. Yes, sir.

Q. Did you receive a reply to that letter?

A. No, sir.

Q. Did you make any further effort to get in touch with Mr. Tobin or any official representative of the company before your next union meeting?

A. Yes, sir.

Q. When did you make your next effort to get in touch with Mr. Tobin?

A. About two days after this letter was sent. Receiving no reply, I tried to contact him again.

Q. How did you try to contact him?

A. By telephone.

[95] Q. Did you call the company office?

A. Yes, sir.

Q. Did you talk with Mr. Tobin?

A. No, sir.

Q. With whom did you talk?

A. With the party answering the phone.

Q. Do you remember whether it was a male voice or a female voice?

A. I think it was a female voice.

Q. What conversation did you have?

A. I told her who I was, and that I was still trying to meet with Mr. Tobin. I told her that I would appreciate an appointment.

Q. What did she tell you?

A. She said, "I will pass the message on to Mr. Tobin subsequently".

Q. Did you receive a call from Mr. Tobin?

A. No, sir.

Q. Did you make any further attempt to see or to talk with Mr. Tobin before your third union meeting?

A. No, sir.

Q. Where was this next union meeting held?

A. At the Laundry Workers Hall on Miami Avenue and Thirty-fifth Street.

Q. Is that the same place where the first two were held?

[96] A. Yes, sir.

Q. Who attended that meeting?

A. The men that were employed by the Seven Up Bottling Company, the drivers involved, Mr. Reilly, and myself.

Q. Approximately how many drivers attended that meeting?

A. I believe there were about eight drivers or nine drivers at that meeting.

Q. Approximately how long was this after the second meeting?

A. It was about a week later.

Q. About a week later?

A. Yes, sir.

Trial Examiner Hunt:

May I suggest, Mr. Pate, that we do not have the date of the second meeting fixed.

Mr. Pate:

We have it fixed as being approximately one week after the first meeting.

Mr. Constangy:

When was the first one?

Trial Examiner Hunt:

We do not have the first one fixed, but we do have the date of this letter, General Counsel's Exhibit 3, fixed, and I suggest the witness fix the date of the third meeting with reference to that letter.

(By Mr. Pate):

Q. Approximately when was the third union meeting held in respect to the letter that you mailed to Mr. Tobin, which has been identified as General Counsel's Exhibit 3?

A. About a week after this letter was sent out.

Mr. Pate:

Mr. Examiner, I will offer in evidence General [97] Counsel's Exhibit 3 for identification.

* * * * * * * *

General Counsel's Exhibit 3 for identification is received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 3 for identification, was received in evidence.)

At this time I think I shall rule upon General Counsel's Exhibits 2-A and -B, upon which I made a reserved ruling. I think there is no objection to those exhibits either.

Mr. Constangy:
No.

Trial Examiner Hunt:
There being no objection, General Counsel's Exhibit 2-A and -B for identification are likewise received in evidence.
[98] (The documents heretofore marked General Counsel's Exhibits No. 2-A and 2-B for identification were received in evidence.)

(By Mr. Pate):
Q. Mr. Lunin, who presided at this union meeting?
A. Myself.
Q. What business was taken up?
A. I reported to the members then that I couldn't seem to make any headway with the firm—using my language—and in accordance with the laws of the State, I must have a strike vote, should the firm refuse to bargain with me any further or refuse to recognize me any further. I explained the procedure—how a vote should be taken. I said, "All those that are in favor of the vote will make the word 'yes'."

[100] (By Mr. Pate):
Q. Mr. Lunin, at this meeting about which you are testifying, did you make a report to the members or

to the employees at the meeting about your efforts to meet with Mr. Tobin?

A. I did.

Q. Did you tell them the same things to which you testified today?

A. I did.

Q. Was there a strike vote taken at that meeting?

A. It was.

Q. How was that vote taken?

[101] A. By secret ballot.

Q. What was the question that was put to the employees to vote on?

A. "Do you wish to strike should your employer continue to refuse to recognize this union? Just put down 'yes', if in favor. Put down 'no' if you don't." Then I left the room.

Trial Examiner Hunt:

That is enough.

(By Mr. Pate):

Q. Who put that question to the employees?

A. I put it.

Q. And you left the room at that point?

A. Yes, sir.

Q. Did you witness the counting of the ballots?

A. No, sir.

Q. Was any other business taken up at that meeting, that you remember?

A. After the ballots were counted then we discussed trying to further negotiations with the firm and trying to contact the firm again.

Q. You returned to the meeting after they counted the ballots?

A. Yes, sir.

Q. And at that meeting or at any other meeting were any committeemen elected?

A. Yes, sir.

Q. Was that at the same meeting?

[102] A. Yes, sir.

Q. What kind of committee did you elect at that meeting?

A. We appointed a steward, who was in charge of the drivers then. All local unions have a steward in every plant, you know. That's like the top man.

Q. What else did you elect?

A. A committee, should the firm agree to listen to us and talk to us. Then they would meet with Mr. Tobin.

Q. You mean a negotiating committee?

A. Yes, sir.

Q. How were these men elected?

A. By a majority of the members present.

Q. What kind of vote?

A. By hand, yes or no.

Q. And that followed nominations from the floor?

A. Yes, sir.

Q. Who was elected as the steward?

A. Nat Freeman.

Q. Who were elected to the committee other than Mr. Freeman?

A. Croon—Walter Croon. Shannon.

Trial Examiner Hunt:

Wait a minute. How do you spell that first name?

The Witness:

C-r-o-o-n. Shannon.

(By Mr. Pate):

Q. Is that Ted Shannon?

A. I believe that's his first name.

[103] Q. Go ahead.

A. And Joe Klein. The steward, of course, being on that without vote.

Q. You mean the shop steward is automatically a member of the committee?

A. Yes, sir.

Q. Is that the substance of everything that went on at that particular meeting?

A. Yes, sir.

Q. After that meeting did you make any further effort to contact the company?

A. I did.

Q. What did you do next?

A. I sent the company a registered letter, return receipt requested.

Q. Did you keep a copy of that letter?

A. I did.

Mr. Pate:

I will ask that the report mark as General Counsel's Exhibit No. 4 for identification this paper that purports to be a copy of a latter dated August 30, 1948, addressed to Mr. Tobin, Jr., purporting to be signed "John J. Lunin", with a registered return receipt attached.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

* * * * * * * *

[104] Mr. Pate:

I will offer in evidence General Counsel's Exhibit 4 for identification.

* * * * * * * *

Mr. Constangy:

We have no objection.

Trial Examiner Hunt:

Do you concede that the original was received?

Mr. Constangy:

Yes, we received the original. Wo do not have it, but we did receive it.

Trial Examiner Hunt:

You do not need to offer the return [105] receipt then.

Mr. Pate:

Since they concede receipt of it, I would like to withdraw the return receipt as part of the exhibit.

Mr. Constangy:

With one reservation. I think since it is being offered, the date on the return receipt might well be stated on the record—the date of the receipt.

Mr. Pate:

Then we will stipulate that the return receipt shows that the date of delivery was 8-31-48.

Mr. Constangy:

All right.

* * * * * * * *

I will receive in evidence General Counsel's Exhibit 4 for identification.

(The document heretofore marked General Counsel's Exhibit No. 4 for identification was received in evidence.)

(By Mr. Pate):

Q. Mr. Lunin, after sending to Mr. Tobin the letter that is in evidence as General Counsel's Exhibit 4, did you make any further effort to contact or talk with Mr. Tobin?

A. I did.

[106] Q. What did you do next?

A. I went back to the office.

Q. When did you go back to the office?

A. I went back around the second or third day—something like that—of September.

Mr. Constangy:

Did you say the second or third day of September?

The Witness:

Yes, something like that.

(By Mr. Pate):

Q. Did you see Mr. Tobin on that occasion?

A. I did.

Q. Did you go alone or with someone?

A. I was alone.

Q. Where did you see him?

A. At his office.

Q. Was anyone present other than you and Mr. Tobin?

A. No, sir.

Q. Will you relate for us the conversation that occurred on that occasion?

A. I asked him whether he received my registered letter. He said, "I did". I said, "Well, Mr. Tobin, I still would like to talk with you and see whether we couldn't get together on the recognition fo the local union." He told me then that he wasn't interested in unions.

Q. That he wasn't interested in what?

A. That he wasn't interested in unions. That driver-salesmen [107] should never belong to a union—unions are good for carpenters and plumbers and electricians and bricklayers, but not for driver-salesmen.

Q. Was anything else said by either of you on that occasion?

A. I told him that we are a bona fide organization, licensed by the state, and that I carried a state card, and that I still would like for him to sit down and and recognize our union as the bargaining agent. He flatly refused, and I left the office.

Q. When you say he flatly refused, what did he say?

A. He said, "I will have no unions in here".

Q. After that day, did you make any further effort to meet with Mr. Tobin at any time before Labor Day of 1948?

A. No, sir.

Q. Was any other union meeting held after the third one that you testified about?

A. Yes, sir.

Q. When was the next meeting held?

A. It was held the Friday before Labor Day.

Q. Where?

A. At the same place, the Laundry Workers Hall on Thirty-fifth Street and North Miami Avenue.

Q. Who attended that meeting?

A. All the drivers employed by the Seven Up Bottling Company, with the exception of two. That was a fellow who was out of town because of some misfortune in his family, I believe, and [108] a fellow by the name of Daniels, I think—I don't know—whatever his name was.

Trial Examiner Hunt:

That Friday would appear to be September 3.

The Witness:

Or Nelson. Yes, I think it was Nelson—not Daniels.

(By Mr. Pate):

Q. You say Nelson was the other man who was not there?

A. That's right.

Q. And were you there?

A. Yes, sir.

Q. Mr. Reilly?

A. Yes, sir.

Q. Was anyone there other than the ones you have named or described?

A. No, sir.

Q. What business did you take up at that meeting?

A. I began by reporting back to these members that Mr. Tobin had flatly refused to recognize the union.

Q. Did you tell them just what had happened in your effort to meet with Mr. Tobin?

A. Yes, sir.

Q. What else did you do then?

A. I just told them, "Boys, the matter is in your hands now. What do you want me to do?"

[109] Q. Go on.

A. They decided that since Monday was Labor Day—

Q. Don't tell us what they decided. Was any kind of vote taken?

A. No, sir.

Q. Was any arrangement made for any other meeting?

A. Yes, sir.

Q. For when was the next meeting set?

A. For September 7 at six a. m. at the Laundry Workers Hall.

Q. September 7 was the day after Labor Day?

A. Yes, sir.

Q. And was that meeting held?

A. Yes, sir.

Q. And did the same people attend who had attended the last meeting?

A. Yes, sir, with the exception that one more didn't attend. I can't think of his name. He lived around Thirty-Sixth Street somewhere.

Q. One driver-salesman was absent?

A. Yes. And the two that I mentioned before.

Q. Will you tell us briefly what occurred at that meeting on September 7?

A. Yes, sir. We went in a body to the plant.

Q. From the meeting?

A. Yes, sir. We met with Mr. Dismukes.

[110] Q. You're getting ahead now. Let's go back to the meeting. Did you have a discussion of a strike at that meeting?

A. Yes, sir.

Q. Was any further vote taken?

A. No.

Q. How long did the meeting last?

A. About twenty minutes.

Q. About what time was it when you went in a body to the plant?

A. It was about seven o'clock, I believe.

Q. Where did you go when you reached the plant?

A. The men stayed across the street, and Mr. Reilly and myself and—I believe it was Nat Freeman—went inside to talk with Mr. Dismukes.

Q. Is that Mr. Dismukes, the sales manager, that you are referring to?

A. Yes, sir.

Q. Did you see him?

A. Yes, sir.

Q. Where did you see him?

A. Right in back of the plant where they do the loading.

Q. Is that inside the building or outside?

A. Inside the building.

Q. Was anyone there with Mr. Dismukes when you talked with him?

[111] A. No, sir.

Q. Please relate just what conversation took place at that time.

A. Mr. Dismukes had known me then and I told him that the men—

Trial Examiner Hunt:

A little louder.

Mr. Constangy:

I can't hear with the typewriter going next door.

The Witness:

I told Mr. Dismukes that the men had decided not to go back to work unless they were recognized as a bargaining unit.

Q. [By Mr. Pate.) What did he say?

A. He said that "You'll have to contact Mr. Tobin, Jr."

Q. Was anything further said on that occasion?

A. And that as soon as he contacted Mr. Tobin he would tell me when to come down to the plant.

Q. Was that the substance of the entire conversation?

A. That was the substance of the entire conversation.

Q. What did you and the men with you do then?

A. Walked off the premises.

Q. Did you go back to where the driver-salesmen were assembled?

A. Yes, sir.

Q. Did you report to them what had happened?

A. Yes, sir.

[112] Q. What did you do then?

A. Waited for Mr. Tobin, Jr.

Q. Did you see him arrive?

A. Yes, sir.

Q. About how long was that after your conversation with Mr. Dismukes?

A. About an hour or so later.

Q. What did you do then?

A. We walked over to Mr. Tobin.

Q. Where did you walk to?

A. He was back of the plant—the same place where we met Mr. Dismukes.

Q. Did you have a conversation with Mr. Tobin there?

A. Yes, sir.

Q. Was that inside the plant, or outside?

A. Inside the plant.

Q. Was anyone there with Mr. Tobin?

A. Mr. Dismukes.

Q. And was anyone with you?

A. Yes, sir.

Q. Who?

A. Frank Reilly.

Q. Who else?

A. Frank Reilly was there; and I think Nat Freeman.

Q. Do you remember any others who were there?

[113] A. No, sir. I think Shannon was there. That's right. Shannon.

Q. Was anyone present other than the ones you have names?

A. No, sir.

Q. Relate for us the conversation that occurred when you met Mr. Tobin and Mr. Dismukes there.

A. I said, "Well, Mr. Tobin, I guess you know what I want to see you about. I'd like for you to please talk to us about this union. We want recognition." That's all. He said, "I told you the other day that the drivers shouldn't belong to any union. Unions are only good for and are meant for people who work in the electrical trade, the building trade, carpenters, and so on and so forth, and I won't recognize any union for my driver-salesmen."

Q. Do you remember anything else that was said on that occasion?

A. I said, "Well, Mr. Tobin, the men want recognition. That's what we are asking for." He just smiled the same as I would smile, and that ended the conversation. I walked off the premises.

Q. Was anything said at any point during that conversation about the men not going to work that morning?

A. No, sir.

Q. Nothing was said about whether they would or would not?

A. No, sir.

[114] Q. And that was the entire conversation?

A. Yes, sir.

Q. Did you go back across to where the men were assembled?

A. Yes, sir.

Q. Did you make any report to them about what had happened?

A. Yes, sir.

Q. And what did you do then?

A. We went to the restaurant at the corner for coffee and some breakfast.

Q. At any time during that day were any pickets stationed anywhere around the plant?

A. Yes, sir.

Q. At what time did you station pickets?

A. They were stationed around eleven o'clock.

Q. In the morning?

A. Yes, sir.

Q. How many were placed there?

A. Two at a time.

Q. And where were they stationed?

A. Right in front of the entrance to the building.

Q. They were stationed right in front of the entrance to the building?

A. Yes, sir.

Q. They walked up and down there?

A. Up and down, walking.

[115] Q. How often were they changed?

A. As often as they cared to change themselves.

Q. Where would the other men stay who were not actually walking on the picket line?

A. Across the street.

Q. How long was the picket line kept there?
A. That day?
Q. No, how many days?
A. Well, the picket line was kept there until about the 16th of the month.

* * * * * * * *

[128] LOUIS M. BARUCH a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Hunt:
Be seated, and give us your full name and address.

The Witness:
Louis M. Baruch, 250 Michigan Avenue, Miami Beach, Florida.

Direct Examination.

(By Mr. Pate):
Q. Mr. Baruch, have you ever been employed by the Seven Up Bottling Company of Miami?
A. Yes, I have.
Q. Are you employed there now?
A. No, I am not.
Q. During what period did you work there?
A. From approximately December 1947 to September 1948.
Q. During that time what was your position with the company?
A. I was the bookkeeper there—office manager. I was in charge of the office.

Q. You worked at the company office and not at the plant itself?

A. That is right.

Q. Do you remember an occasion in September 1948 when a [129] number of the driver-salesmen did not go to work one morning?

A. Yes. I believe it was the first day of the week. I came in to work that morning, and shortly thereafter Mr. Sherman Tobin and Charley Dismukes, sales manager, came down to the office.

Q. Just a minute. You remember the occasion when they did not come to work?

A. Yes, I do.

Q. When was that in respect to Labor Day of 1948, do you remember?

A. Well, right around there. I believe it was the day after.

Q. On that morning did you have any conversation with Mr. Tobin—Mr. Sherman Tobin—in respect to the fact that the men had not reported to work in the morning?

A. Well, I got the news when Mr. Sherman Tobin and Mr. Dismukes came down from the plant to the office.

Q. Then did you talk with them?

A. Yes, I did.

Q. Where did that conversation take place?

A. In the office.

Q. Who was present at that time?

A. Mr. Dismukes, Mr. Tobin, and myself.

Q. Did Mr. Tobin have something to say about the fact that the men had not come to work?

A. Yes. They were worried about what effect it would have [130] on the business.

Q. What did Mr. Tobin say about it?

A. I don't recall any exact words, but they were worried about the situation.

Q. Did he ask either you or Mr. Dismukes for any suggestions or advice on the subject?

A. I volunteered the information that they should speak to the men or their representative in order to stall the strike and give them more time.

Q. When you made that statement, did Mr. Tobin make any reply or any statement that you remember?

A. Well, he wasn't in agreement with my opinion.

Q. What did he say?

A. He said, "No, I don't believe we'll do that," and they decided to fight the strike.

Q. What did he say about fighting the strike?

A. They didn't know exactly what to do. They were probing possibilities, and I believe Mr. Tobin asked Mr. Dismukes if he knew any attorneys who had handled labor matters in the City of Miami.

Q. Did he say he was going to fight the strike?

A. Yes, he did say that.

Q. And did he give any reason? Did he say whether he wanted the union or not?

A. He said he didn't.

* * * * * * * *

[131] (By Mr. Pate):

Q. Mr. Baruch, do you remember anything else that Mr. Tobin said about the union?

A. Only generally speaking. I don't remember any specific words.

[132] Q. Well, just give us the substance of what he said.

A. The substance of it was that in general he did not care to deal with the union because he did not care to have them gain a foothold. He did not want to be told by any union in the future as to what to do or what not to do.

Q. Do you remember anything else that he had to say?

A. On that?

Q. Yes.

A. Well, no, I don't. I can only explain what happened in that situation at this particular point.

* * * * * * * * *

[133] The Witness:

Well, at the time that Mr. Tobin said that he didn't want to deal with the union or permit a union to gain a foothold in the company, as I said before, he asked Mr. Dismukes for the names of attorneys that he could recommend. Well, they couldn't get together on any attorney's names. Mr. Tobin then decided to call—I believe it was Mr. Pace, who was the attorney for his father, who had handled other legal matters for that company. I believe Mr. Pace at that time said that he couldn't handle it because of unfamiliarity with labor laws, but he did recommend Mr. Bernstein.

At that meeting Mr. Tobin then called Mr. Bernstein, and I believe the outcome of the conversation was that an appointment [134] was made for the following morning.

Trial Examiner Hunt:

This was in your presence?

The Witness:
Yes, sir.

* * * * * * *

(By Mr. Pate):
Q. Mr. Tobin—did Mr. Tobin make any statement about whether he did or did not want a union in the plant?

* * * * * * * *

[135] The Witness:
I thought I answered that question by saying that Mr. Tobin did not want the union to gain any foothold, and refused to deal with them.

(By Mr. Pate):
Q. Is that what he said?
A. That is what he said. He said he wouldn't deal with them.
Q. Did he give any reason?
A. I thought I testified to that.
Q. Well, if you remember now, will you tell us what the reason was, if he stated the reason?
A. Generally, he didn't want the union in there to dictate to him as to the policies of the company.

Mr. Pate:
That is all.

Cross Examination.

* * * * * * * *

[142] Q. All right. Now, Mr. Baruch, do you remember the week of the strike insofar as the activities of

Mr. Tobin and Mr. Dismukes were concerned? Do you remember whether they interviewed any people during that week?

A. Yes, they interviewed a number of them that week.

Q. Do you remember which days of the week they were interviewing those people?

A. I believe that started on Wednesday—Wednesday afternoon.

Q. Wednesday afternoon?

A. After their conference with Mr. Bernstein.

Q. Then how long did it continue?

A. It continued all week.

* * * * * * * *

[144] Q. Did Mr. A. J. Tobin spend any time at the plant or at the office?

A. Well, what is it?

Q. At the office—the place you worked?

A. Yes. He spent quite a bit of time there.

Q. Was he in charge while you were there?

[145] A. Was he in charge?

Q. Yes.

A. In a way I would say he was.

Q. Did he give the directions?

A. He was my employer.

Q. Did he give directions?

A. Yes, he did.

Q. Did he give directions to Mr. Sherman Tobin in your presence?

A. I don't think he would let him.

Q. You don't think Sherman would let Mr. A. J. Tobin give him directions?

A. They had quite a few arguments.

Q. If they differed, whose decision prevailed?

A. I think Sherman's prevailed.

Q. Over Mr. A. J. Tobin's?

A. That's right.

Q. Was that from the beginning of the time you were hired, or was that subsequent to the incorporation of the business?

A. Well, there were several times that differences of opinion did come up, and it was fought out between the two of them.

Q. It was fought out between the two of them?

A. That's right.

Q. And was agreement reached?

[146] A. I imagine so.

* * * * * * * *

[151] Re-Cross Examination.

(By Mr. Constangy):

Q. There were other employees of the Seven Up Bottling Company who worked on a straight salary, weren't there, besides them?

A. Yes. Mr. Dismukes did. The garage mechanic did.

Q. The advertising man did?

A. The advertising man did.

Q. Didn't the refrigerator man also work on a straight salary?

A. Yes, he did.

Q. Weren't there a number of employees who loaded and unloaded and who operated bottling machines who also worked on a straight salary?

A. Well, the plant employees worked on a hourly salary—an hourly basis. I mean their salary would

vary from week to week, depending on the number of hours they put in in any particular week.

Q. But it was salary, wasn't it? It was not commission.

A. Yes, that's right.

* * * * * * * *

[153] LAWRENCE T. NESTA a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Hunt:

Is your name Lawrence T. Nesta?

The Witness:

That is right, sir.

Direct Examination.

* * * * * * * *

[156] (By Mr. Pate):

Q. When did you last go to work for the Seven Up Bottling Company?

A. In June of 1948.

* * * * * * * *

[157] Q. When did you go out on the truck?

A. In August.

Q. August of 1948?

A. August of 1948.

* * * * * * * *

[160] Q. After you became a driver-salesmen, did you ever join any union or apply for membership in any union?

A. Yes, sir.

Q. Did you sign a card?

A. Yes, sir, I did.

[161] Q. From whom did you get the card?

A. From Mr. Freeman.

Q. Did he ask you to sign it?

A. Yes, sir, he did. He asked me to join the union.

Q. After you signed it, what did you do with the card?

A. I returned the card to Mr. Freeman.

Q. Was that the same day?

A. No, sir, it was the next day.

Mr. Pate:

I will ask that the reporter mark as General Counsel's Exhibit 6 for identification, a card that purports to be an application for membership aad purports to bear the signature of Lawrence Nesta.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 6 for identification.)

* * * * * * * *

[162] (By Mr. Pate):

Q. And I will ask you, Mr. Nesta, if you made the entry on that card opposite the word "Date" at the top, "8/31/48". Did you make that entry?

A. Yes, sir.

Q. Is that the date when you signed it?

A. Yes, sir.

Mr. Pate:

I will offer in evidence General Counsel's Exhibit No. 6 for identification.

Mr. Constangy:

No objection.

Trial Examiner Hunt:

It is received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 6 for identification was received in evidence.)

(By Mr. Pate):

Q. Mr. Nesta, did you ever attend any meetings of the union?

A. Yes, sir, I did.

Q. When did you attend the first meeting?

A. Sunday before Labor Day, I believe.

Q. Where was that meeting held?

A. Miami Laundry Workers Union on North Miami Avenue—I don't know the exact address.

Q. Who attended that meeting?

A. All the drivers, Mr. Lunin, and Mr. Reilly.

[163] Q. Do you remember any business that was taken up at that meeting?

A. Yes, sir, I do.

Q. What do you remember?

A. The business of the meeting was to lay our case before Mr. Tobin for recognition of the motion; if not, we would strike.

Q. Was there a vote taken on the strike?

A. Yes, sir, there was.

Q. How was it taken?

A. Secret ballot on blank paper—yes or no.

Q. What was the question that was put to the members for them to vote on?

A. That if Mr. Tobin would not recognize the union, we would strike.

Q. Were the ballots collected?

A. Yes, sir, they were.

Q. Did you see them?

A. I certainly did, sir.

Q. Did you count them yourself?

A. Yes, sir.

Q. What was the result of the vote?

A. All in favor, if the company did not recognize the union, we would strike.

* * * * * * * *

[164] Q. Do you remember whether any officers or committeemen were elected at that meeting?

[165]] A. Yes, sir, they were.

Q. Who was elected?

A. To represent the drivers, Mr. Croon, Mr. Freeman, and Mr. Shannon.

Q. What kind of committee was that?

A. To represent the drivers.

Q. How were they elected?

A. By a voice vote.

* * * * * * * *

Q. After that meeting did you attend any other meetings?

A. Yes, sir.

Q. When was the next one that you attended?

A. At six o'clock on Tuesday morning, the day after Labor Day.

Q. Was that meeting held at the same place?
A. Yes, sir, it was.
Q. Was that meeting attended also by the drivers?
A. By the drivers, yes.
[166] Q. And Mr. Lunin and Mr. Reilly?
A. Yes, sir.
Q. What did you talk about at that meeting?
A. We were going to present our case to Mr. Tobin.
Q. How long did the meeting last?
A. Not very long.
Q. After it was over, where did you go?
A. We all stayed together at the hall until the plant opened up.
Q. Then what did you do?
A. Mr. Lunin and Mr. Reilly went—
Q. What did you do—all the men that were gathered there? What did they do after they left the union meeting?
A. They went down to the plant as a body, and one of the men, not elected to the committee, he stayed across from the plant.
Q. Who was the one across the street? Strike that. Who went to the plant?
A. Mr. Lunin, Mr. Reilly, Mr. Croon, Mr. Shannon, and Mr. Freeman. Those five gentlemen.
Q. Where did they go?
A. They went into the plant.
Q. Did you see them in the plant?
A. Yes, sir, I did.
Q. Did you see them talking with anybody?
[167] A. Yes.
Q. Who?
A. Mr. Dismukes.
Q. How long were they there?

A. They weren't there very long because Mr. Tobin hadn't come in very long—I mean Mr. Tobin hadn't come in yet, and Mr. Lunin came over and notified us that they'd have to wait until Mr. Tobin came in.

Q. Was that a few minutes?

A. Five or ten.

Q. And did all of you wait there?

A. Outside, yes.

Q. And did you see Mr. Tobin come in?

A. Sometime later Mr. Tobin drove up and drove in the back way.

Q. About how long was that after they went to see Mr. Dismukes?

A. Possibly an hour or so.

Q. And what happened then?

A. The committee went back across the street and talked to Mr. Tobin.

Q. The same ones went back?

A. Yes, sir.

Q. Could you see where they went, from where you were standing?

[168] A. Yes, sir.

Q. Where did they go?

A. To the back door, the back driveway.

Q. Did they meet anybody there?

A. They spoke to Mr. Tobin, and Mr. Dismukes was back there too.

Q. Could you see them?

A. Yes, I could see them.

Q. About how long did that conference go on? How long were they together?

A. I could not really say.

Q. Were you there when it broke up?

A. Yes, sir.

Q. What did Mr. Lunin and Mr. Reilly and the committeemen do then?

A. Mr. Lunin and the committee came across the street, and Mr. Lunin said, "Well, fellows, I don't think Mr. Tobin sees things our way, so it looks like we'll probably have to go out on strike. He doesn't believe in a union in the bottling industry."

* * * * * * * *

[169] Q. What did you do then?

A. Mr. Lunin went down and got some signs fixed up for us, and we decided to picket.

Q. Were pickets stationed that same day?

A. Yes, sir.

Q. Around the plant?

A. Yes, sir.

* * * * * * * *

Q. About how many days did the picketing continue?

A. About two weeks.

* * * * * * * *

[172] (By Mr. Pate):

Q. Have you ever worked for the Seven Up Bottling Company since that time?

A. No, sir; I haven't.

Q. Has anybody ever asked you to come back to work?

A. No, sir, nobody has ever approached me.

Mr. Pate:

That is all.

Cross Examination.

* * * * * * * *

[178] Q. At that meeting on September 5, you say that the meeting was held on Sunday?

A. That's right.

* * * * * * * *

Q. Who was present at that meeting?

A. All the drivers except one, and he was back in Georgia at the time.

Q. Who else? Any other people?

A. Mr. Lunin and Mr. Reilly.

* * * * * * * *

[179] Q. So Tuesday morning you had your meeting and you went over in a body to the plant?

A. Yes, sir.

* * * * * * * *

[180] Q. And the rest of you didn't go in to work at all that morning?

A. No, sir.

Q. Were you dressed, ready to go to work?

A. That's right.

* * * * * * * *

[188] Trial Examiner Hunt:
You said that all drivers except one were present at this union meeting at which the strike vote was taken?

The Witness:
Yes, sir.

Trial Examiner Hunt:
Who was absent?

The Witness:
A fellow working for them now. A fellow by the name of Woody, I think.

Trial Examiner Hunt:
Woody?

The Witness:
Yes, sir.

Mr. Pate:
Is that a first name?

The Witness:
I don't know.

Mr. Tobin:
His name is Wood.

Trial Examiner Hunt:
Wood is the man who was on leave.

Mr. Constangy:
Yes, sir.

Re-Direct Examination.

(By Mr. Pate):

Q. Did you know someone named Nelson?

A. Yes, I did.

Q. Was he at the meeting?

A. No, sir, he wasn't.

Q. He wasn't in the union at all?

A. No, sir, he wasn't. His reason for not joining the union was that he didn't intend to be there very long.

Q. Well, on the morning of September 7, when the strike started, how many of the driver-salesmen stayed out that day?

A. All of us but Mr. Nelson.

Q. How about the one you called Woody?

A. He wasn't there. He was up in Georgia for a funeral, I think.

Q. All the rest stayed out?

A. Yes, sir.

Q. And did the rest of them picket?

A. Yes, sir.

Q. Did they continue to picket during the strike?

A. Yes, outside of one fellow. He went back.

Q. Do you remember his name?

A. I knew him as Cliff.

Q. Was it Clifford Voight?

A. I don't know his last name. A big, heavy-set fellow, who still works there.

* * * * * * * *

[194] JOSEPH L. KLEIN a witness called by and on behalf of the National Labor Relations Board,

being first duly sworn, was examined and testified as follows:

Trial Examiner Hunt:

Be seated. Give us your full name and address.

The Witness:

Joseph L. Klein, K-l-e-i-n, 1048 Alton Road, Miami Beach.

Direct Examination.

* * * * * * * *

Q. Mr. Klein, have you ever worked for the Seven Up Bottling Company of Miami?

A. Yes, sir.

Q. Do you work there now?

[195] A. No, sir.

* * * * * * * *

Q. You were in the service?

A. I was.

[196] Q. Did you return to work for the company after the war?

A. I did.

Q. Approximately when was that?

A. January of 1946.

Q. How long had you been away at that time?

A. Forty-three months.

Q. You continued then to work as a driver-salesman?

A. I did.

Q. Up until September of 1948?

A. That's right.

Q. Mr. Klein, while you were working for the company, did you ever join or apply for membership in a labor organization?

A. In September of 1948—I mean August of 1948.

Q. What organization was that?

A. Teamsters' Union, American Federation of Labor.

Q. Did you sign a card?

A. I did.

Q. From whom did you get the card?

A. Nat Freeman.

Q. Was he one of the driver-salesmen?

A. He was.

Q. And did you return the card to Mr. Freeman?

A. I did.

Q. After signing it?

A, I did.

[197] Q. Was that at the same time he gave it to you, or was it later?

A. I think it was a day later that I gave it back to him.

Mr. Pate:

I will ask the reporter to mark as General Counsel's Exhibit 7 for identification, this card headed "Application for Membership", dated 8-10-48, and purporting to bear the signature of Joseph L. Klein.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 7 for identification.)

* * * * * * * *

Q. I will call your attention to the entry opposite the printed word "Date" where the figures "8-10-48" appear. Did you put those figures in yourself?

A. I did.

Q. Is that the date when you signed the card?

A. That's right.

* * * * * * * *

[198] (By Mr. Pate):

Q. Mr. Klein, after you signed this card about which you have just testified, did you attend any union meetings?

A. I did.

Q. When did you attend the first meeting?

A. About a week after I signed the card.

Q. Where was that held?

A. At the Laundry Workers Union Hall.

Q. Can you tell us by whom that meeting was attended?

A. Who was there?

Q. Yes.

A. There were driver-salesmen, and Mr. Lunin and Mr. Reilly.

Q. Approximately how many driver-salesmen were there?

A. About eight or ten.

Q. They all worked for Seven Up Bottling Company?

A. They did.

Q. Can you tell us briefly what business was taken up at that meeting?

A. We were told of the benefits of the union, and how much [199] good they could do us.

Q. Was any business taken up other than a general discussion about the union and organization?

A. It was just a general discussion.

Q. After that time did you attend any other meetings?

A. I did.

Q. When was the next meeting held that you attended?

A. About a week later.

Q. Where was that held?

A. At the same place.

Q. Did the same people attend that one?

A. Yes.

Q. What business was taken up at that meeting?

A. That we would speak to the members of the Seven Up Bottling Company and ask them to recognize our union.

Q. Who made that statement?

A. One of the drivers mentioned it.

Q. Was there a general discussion at the meeting about the recognition?

A. There was.

Q. Was any other business taken up at that meeting that you remember?

A. I think there was a discussion that if they did not recognize us, we would strike.

Q. Was a vote taken?

[200] A. There was a vote taken.

Q. And was that the question on which the vote was taken?

A. That's right.

Q. How was it taken?

A. It was taken by a ballot.

Q. Was that oral or written?

A. Written.

Q. And were the ballots collected?
A. They were.
Q. Did you see them?
A. Yes, sir.
Q. Did you see all of them?
A. I saw them all collected, yes.
Q. Did you count them?
A. No.
Q. Did you see what was on the ballots that were collected?
A. No.
Q. Was the result announced?
A. It was.
Q. What was the result as it was announced?
A. Unanimous for a strike.
Q. Either at that meeting or at some other meeting, were any committeemen elected?
A. There were. I think at that meeting they were elected.
Q. You think it was the same meeting?
[201] A. Yes.
Q. How were they elected?
A. Someone raised their name to be elected, and it would be seconded by the other members.
Q. Can you tell us who the committeemen were who were elected at that time?
A. Ted Shannon, Walter Croon, and Nat Freeman.
Q. Were they all driver-salesmen?
A. I think they were. Yes, they were.

* * * * * * * * *

Q. After that meeting about which you have been testifying, did you attend any other union meetings?
A. There was one more, I believe.

Q. Where was that one held?

A. The same place.

Q. When?

A. The morning of September 7.

Q. The morning of September 7?

A. Yes, sir.

[202] Q. Who attended that meeting?

A. All the drivers who were members, and Mr. Reilly and Mr. Lunin.

Q. You say all the drivers who were members.

A. Yes.

Q. Were there any driver-salesmen working for the company then who did not attend that meeting?

A. Just one.

Q. Do you know what his name was?

A. Nelson.

Q. He was not in the union?

A. Wait a minute. I think there was another one who wasn't there either. He was on leave, or something.

Q. Could that have been Mr. Wood?

A. Yes, Mr. Wood, I believe.

Q. Was any business taken up at that meeting?

A. Well, it was decided that the committee would go down and speak to Mr. Tobin and ask to be recognized.

Q. When you refer to Mr. Tobin, which Mr. Tobin are you speaking of?

A. Mr. Sherman Tobin.

Q. The gentleman sitting here (indicating)?

A. That's right.

Q. How long did that meeting last?

A. Oh, fifteen-twenty minutes.

[203] Q. What did you do then?

A. We all went down to the Seven Up Bottling plant, and the committee and Mr. Lunin and Mr. Reilly went in to the Seven Up Bottling Company. I wasn't a committeeman, so I just stood on the outside and waited for them to come back.

Q. When they went into the plant or over around the plant somewhere, where were the other driver-salesmen?

A. Across the street.

Q. In front of the plant?

A. That's right.

Q. Who was it that went over to the plant?

A. Mr. Shannon, Mr. Croon, Mr. Freeman, Mr. Lunin, and Mr. Reilly.

Q. How long were they there?

A. About fifteen-twenty minutes.

Q. Did you see them talking or standing with anyone over around the plant?

A. I did. They were on the outside, at the back gate.

Q. Who was there?

A. Mr. Dismukes came out then.

Q. Mr. Dismukes and the group you just named?

A. That's right.

Q. Then after that conversation broke up, what did Mr. Lunin and Mr. Reilly and these committeemen do?

A. They came back and reported to us that they asked to [204] speak to Mr. Tobin, and Mr. Dismukes said he would get hold of him and bring him down.

Q. Who made that statement?

A. Mr. Freeman.

Q. Did you see Mr. Tobin around that morning?

A. I did.

Q. Approximately how long was it after this conference between the committee, Mr. Lunin, Mr. Reilly and Mr. Dismukes?

A. About an hour.

Q. What happened then after Mr. Tobin arrived?

A. The committee and Mr. Reilly and Mr. Lunin went back into the plant this time.

Q. They went inside the plant?

A. That's right.

Q. Did you see them inside the plant?

A. No.

Q. Then you did not see them talking with Mr. Tobin that morning?

A. No.

Q. How long were they gone on that occasion?

A. About half an hour.

Q. Then what did they do?

A. They came back out and reported that Mr. Tobin would not recognize the union and wouldn't have anything to do with the union, and wouldn't have anything to do with us.

[205] Q. Then what did the driver-salesmen do?

A. We started to picket the Seven Up Bottling Company.

Q. How long was the picketing continued?

A. About a week or ten days.

Q. Did you ever picket yourself?

A. I did.

Q. How often?

A. About every two hours, every three hours.

Q. How often did the shift change on the picket line?

A. At that time about every two or three hours.

Q. How many men were stationed there at one time?

A. Two. Two men would picket at a time.

Q. Mr. Klein, I will hand you General Counsel's Exhibit No. 1-B, and call your attention to this list of names which is headed "Appendix A". I will ask you to look at that list; and tell us whether you know all the persons whose names are listed there (handing to witness).

A. This last name, Studley. I don't seem to remember that one.

Q. You know all of them except Studley?

A. Yes.

Q. With the exception of Studley, do you know whether each of those other men was employed by the Seven Up Bottling Company immediately before the strike?

A. They were.

[206] Q. Do you know what job each of them was working on just before the strike of September 7, 1948?

A. They were all driver-salesmen.

* * * * * * * * *

Q. Immediately before September 7, 1948, were there any driver-salesmen employed by the company other than the ones that are on that list that I just showed you?

A. I don't understand you.

Q. You just checked the list there.

A. Yes.

Q. The list that I handed you.

A. Yes.

Q. Were there any driver-salesmen employed by the company immediately before September 7, 1948, who are not on that list?

A. Not that I remember.

Q. You named Mr. Nelson a few minutes ago.

A. Yes.

Q. Was he employed by the company at that time as a driver [207] salesman?

A. Yes, sir.

* * * * * * * * * *

[209] (My Mr. Pate):

Q. Mr. Klein, you have just examined the list of employees that I handed you. It is a part of General Counsel's Exhibit 1-B. Could you tell me whether each of these employees was in the group that went to the meeting on the morning of September 7?

A. Mr. Croon was.

Q. You say you don't remember Studley, so I won't ask you about him.

A. That doesn't mean he wasn't there. We used to have fellows in and out there.

Trial Examiner Hunt:

But you don't know whether he was there because you don't know him?

The Witness:

I mean it was possible that he was there.

Trial Examiner Hunt:

All right.

The Witness:

Croon, Freeman. I was there. Nesta was there; Yost was there; MacCubbin was there; Shannon was there; Chase was there.

(By Mr. Pate):

Q. Case.

A. I mean Case. And Fisher.

Q. You know all those were there?

A. Yes.

Trial Examiner Hunt:

Is that everyone except Studley?

[210] The Witness:

Yes, sir.

(By Mr. Pate):

Q. Now, Mr. Klein, do you know whether any of the men on this list went to work that morning or not?

A. No.

Q. That is the group that you have just mentioned.

A. That's right.

Q. You know that they did not?

A. I know that they didn't go to work.

Q. Do you know how many of these men served on the picket line after that?

A. All of them.

Q. Do you know specifically whether Mr. Shannon served on the picket line?

A. I do, because I served with him.

* * * * * * * *

[212] Q. And you have not worked for the company since that time?

A. No.

* * * * * * * *

[214] Trial Examiner Hunt:

I am a little confused in one respected. You said that the committee consisted of Shannon, Croon and one other person.

The Witness:

Freeman.

[215] Trial Examiner Hunt:

All right. Go ahead, Mr. Constangy.

Cross Examination.

* * * * * * * *

[227] Mr. Constangy:

We have no objection to the admission of this, Mr. Examiner.

Trial Examiner Hunt:

General Counsel's Exhibit 7 for identification is received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 7 for identification was received in evidence.)

(By Mr. Constangy):

Q. Now, you testified, Mr. Klein, that on the morning of the 7th, which was the morning of the strike, that you all met at the Laundry Workers Hall?

A. That's right.

* * * * * * * *

[228] Q. In other words, what I am trying to get at is this: Before the committee or you or Mr. Lunin or whoever went to see Mr. Dismukes went there, did any of the men drift into the plant at all?

A. No.

Q. Nobody went into the plant?

A. I didn't see them.

Q. Were they with you?

A. We were all in one group.

Q. You were all in one group?

A. That's right.

Q. Nobody went inside the enclosure?

A. I don't remember seeing them.

Trial Examiner Hunt:

Is the distinction clear in the witness's mind between the entire group of employees and the others?

(By Mr. Constangy):

Q. I am talking about men who were at the meeting with you first. None of those men went in?

A. The committee.

Q. I am not talking about as a committee. I am talking about drifting in.

A. You mean men other than those on the committee? Is that what you mean?

Q. Yes.

[229] A. No, I didn't see any.

Q. None of them went in?

A. That's right.

Q. Were any other employees in the plant when you came up, other than the group that had been at your meeting? Were any of the loaders inside? The bottling people?

A. Yes. All the other help outside of the driver-salesmen, I imagine, reported.

Q. Did you see any of them in there?

A. Yes, I could see people walking around.

* * * * * * * *

[231] Q. Where did you picket during the strike?

A. The office.

* * * * * * * *

[232] Q. All right. Now, Mr. Klein, do you remember when the trucks started moving again—the trucks of the Seven Up Bottling Company?

A. What do you mean by moving?

Q. When they started running trucks again.

A. You mean when they started running the routes?

Q. Yes.

A. About a week or ten days after.

Q. About a week or ten days after?

A. Yes.

Q. How long did the pickets stay on after they started moving the trucks again?

A. A few days.

Q. Just a few days?

A. Yes.

* * * * * * * *

[239] JOHN J. LUNIN resumed the stand and was examined and testified further as follows:

[240] Cross Examination.

[245] Q. How long would you say they were picketing?

A. A little less than two weeks.

Q. A little less than two weeks?

A. That's right.

Q. And this strike started on September 7?

A. Yes.

[246] Q. At that time, Mr. Lunin, were all driver-salesmen and plant help on strike?

A. Yes, sir.

Q. Are you sure?

A. All but two men.

[247] Q. And you know that at that time the company had put its trucks back on the street, don't you?

A. No, sir.

Q. You don't know that?

A. It was on a Monday that they put the trucks back.

Q. Well, Monday was September 13.

A. The 13th. That's right.

[261] Trial Examiner Hunt:

Did you make an effort to contact Mr. Tobin while the second meeting was in progress?

The Witness:

No, before, because I had my majority cards all ready.

Trial Examiner Hunt:

All right. Go ahead, Mr. Constangy.

(By Mr. Constangy):

Q. All right, Mr. Lunin. You made a [262] contact by phoning his plant?

A. Yes, sir.

Q. And then by going by there and leaving your cards, is that right?

A. Yes, sir.

Q. Then when was it that you first saw Mr. Tobin?

A. I first saw Mr. Tobin, I believe, after he got my first letter.

Q. And your first letter was written on—

A. August 19.

Q. August 19?

A. That's right.

Q. So you first saw Mr. Tobin sometime after the 20th, wouldn't you say?

A. Yes.

Q. Now, Mr. Lunin, you had by that time had at least two and possibly three meetings with the men, hadn't you?

A. Yes.

Q. Did you know that Mr. A. J. Tobin was out of town?

A. I didn't know A. J. Tobin.

Q. You didn't know A. J. Tobin?

A. No, sir.

Q. Did you know there was a Mr. Tobin, Jr. and a Mr. Tobin, Sr.?

A. Yes, sir.

[263] Q. Who told you that?

A. The boys.

Q. Did they also tell you that Mr. Tobin, Sr. was the boss?

A. No, sir.

Q. Did you know that?

A. They told me Mr. Tobin, Jr. was the boss.

Q. They told you Mr. Tobin, Jr. was the boss?

A. Yes, sir.

Q. When did they tell you that?

A. All the way through—that he was the general manager.

Q. Did they tell you that before you wrote your first letter?

A. Yes, sir.

Q. Did they tell you that after you wrote your first letter?

A. Yes, sir.

Q. Did Mr. Tobin, Jr. ever tell you that his father was out of town?

A. No, sir.

Q. He never did?

A. No, sir.

Q. And nobody else ever told you that Mr. Tobin, Sr. was out of town?

A. The boys told me he was out of town because of a heart ailment.

. . . . . .

[266] (By Mr. Constangy):

Q. Now, Mr. Lunin, in the course of your conversations with anybody—the men, Mr. Sherman Tobin, or anybody else—did they tell you that Mr. A. J. Tobin would be back in a few weeks, that he was out ill?

A. No, sir.



[269] Q. I am asking you what was the conversation the morning of the strike?

A. He said, "Mr. Lunin, I told you I won't recognize the union. Unions aren't for driver-salesmen. Unions are for the building trades, such as bricklayers, carpenters, electricians, and people of that sort, and not for driver-salesmen."

Q. He told you that the morning of the strike?

A. Yes, sir.

Q. Did he tell you that on any other occasion?

A. Yes, sir.

Q. How many other occasions?

A. At the office when I had the pleasure of meeting Mr. Tobin.

Q. Before or after the strike?

A. Before.

Q. At the first meeting?

A. Yes, sir.

Q. Did Mr. Dismukes ever make that remark to you?

A. Mr. Dismukes made that remark to me after that.

Q. When did Mr. Dismukes make that remark to you?

[270] A. The day of the strike, when I spoke to him.

Q. Was that before Mr. Tobin came in?

A. Yes, sir.

Q. Now, let me see if what you are testifying is this—that you came into the plant the morning of the strike, and what did you ask Mr. Dismukes?

A. I asked Mr. Dismukes whether he had any authority to recognize the union. He said no. The only man with authority would be Mr. Tobin. Not knowing the elder Mr. Tobin, I took it for granted this is the gentleman. And he said, "He told you he won't recognize the union. I'll try to get him down there." Then he made that call.

Q. When did he say something about carpenters, bricklayers, electricians, and so forth?

A. At the office, and again over there.

Q. Mr. Dismukes made that statement?

A. No, sir. Mr. Tobin made that statement.

Q. What I was asking you is whether Mr. Dismukes ever made such a remark to you?

A. No, sir.

Q. He never said that in your presence, or to you?

A. No, sir.

Q. Mr. Tobin apparently came in about an hour later, is that right?

A. Yes, sir.

Q. Mr. Sherman Tobin?

[271] A. Yes, sir.

Q. This gentleman here on my right (indicating)?

A. Yes, sir.

Q. What was the conversation between you and Mr. Sherman Tobin?

A. I told him, "Mr. Tobin, you have my registered letter telling you just how the men feel, and I will ask you please to recognize this as the union—recognize us as the union." He said, "I told you before I won't recognize any union in here. Unions are for

carpenters, bricklayers, and so on and so forth. Driver-salesmen have no right to a union."

Q. That is what he said?

A. Yes, sir.

Q. And that is all he said?

A. That's all.

Q. And was anything said after that?

A. Yes. I told him, I said, "You're taking the wrong attitude, Mr. Tobin, because we are a bona fide organization, licensed by the State. I am licensed by the State." I said, "And if you feel you can't do anything at this time, we are willing to let it go to the National Labor Relations Board, and let them decide." He wouldn't have any part of it, and he turned away from me. Then I walked out.

. . . . . .

[272] Q. Well now, Mr. Lunin, was there ever any statement in any conversation between you and Mr. Sherman Tobin to the effect that he doubted that you had a majority?

A. Yes, sir.

Q. When did he say that?

A. He said that before I sent that letter.

Q. You mean the registered letter?

A. Yes, sir.

Q. He told you he doubted that you had a majority?

A. Yes, sir.

[273] Q. Where was that conversation?

A. In his office.

Q. Was that the first time you saw him?

A. Yes, sir.

Q. In other words, that was the visit that you had with Mr. Tobin by himself?

A. Yes, sir.

Q. Nobody but you and Mr. Tobin?

A. Yes, sir.

* * * * * * * *

[286] Re-Direct Examination.

(By Mr. Pate):

Q. Mr. Lunin, you testified on cross [287] examination that at one of these conferences with Mr. Tobin, he raised some question about your majority?

A. Yes.

Q. Which conference was that?

A. That was the first one.

Q. What did he say about your majority?

A. He said to me, "I don't know whether you have a majority," and he told me to go back and talk to them and see if they still want a union, because he said he wouldn't recognize it, and that was what prompted me to call another meeting and to send him that second registered letter.

Q. Did you make any reply to Mr. Tobin's statement that he didn't know whether you had a majority?

A. Yes, I told him there are three ways of doing it.

Q. Was this all at the same conference?

A. Yes, sir.

Q. Go ahead, and tell us what you said.

A. I told him there were three ways of doing it—cross check of cards, I said—recognize me, or an NLRB election.

Q. Did he make a reply to that?

A. He said, "I'm not interested in unions in here." That's what caused me to send that registered letter later on.

Q. Was that all the conversation at that particular meeting about proving the majority?

A. Yes, sir.

[288] Q. Was that subject ever discussed again between you and Mr. Tobin?

A. Well, after my second letter he never doubted me—that I had a majority.

Q. You mean he never raised a question again?

A. Never raised any question.

Q. I call your attention to the conversation you had with Mr. Tobin on the day when the strike began. Was any statement made by either of you about proving the majority on that occasion?

A. Yes, sir, I told him, I said, "I have the majority. Any time you want to cross check, you can cross check, or if you want to leave it to the NLRB, it is O. K. with me."

Q. I will ask you this, Mr. Lunin: Did he make a reply to that statement?

A. He said, "I'm not interested." The first conversation at that plant was, "I told you drivers should not belong to no union—driver-salesmen. Unions are good only for bricklayers, carpenters, electricians, and so on."

* * * * * * * *

Re-Cross Examination.

(By Mr. Constangy):

Q. Mr. Lunin, you have now given us [289] three versions of what happened in the conversation on the morning of the strike.

A. Yes?

Q. Will you start in at the beginning and tell us what you said and what he said, from beginning to end, and cover the whole conversation, please, sir.

A. Sure. I waited for Mr. Tobin to come in. When he came in, he knew me.

Q. He knew you?

A. Yes, sir. "Good morning." "Good morning."

Q. Go ahead.

A. Mr. Tobin said, "Well?" I said, "Mr. Tobin, I have a mandate from my people."

Trial Examiner Hunt:

Just go ahead.

The Witness:

I am just trying to tell you everything I know.

Trial Examiner Hunt:

All right.

The Witness:

I said, "I have a mandate from my people—the people I represent. This isn't personal. I have nothing against you, and I hope you have nothing against me. But I represent my people, and I am going to ask you to please recognize us as the bargaining agent." He says, "I will not recognize you. I told you before. I told you before in my office that unions are for carpenters, bricklayers, electricians, and so forth, and not for driver-salesmen."

[290] (By Mr. Constangy):

Q. What else?

A. I said, "I have no alternative then but to report back to these men, and they are going to refuse

to work unless we have recognition." He just turned around and walked away from me. I walked out.

Q. Now, Mr. Lunin, was that the entire conversation between you and Mr. Tobin?

A. That was the entire conversation between me and Mr. Tobin, yes.

* * * * * * * *

Further Direct Examination.

* * * * * * * *

[291] (By Mr. Pate):

Q. Mr. Lunin, will you state the instances where there was discussion between you and Mr. Tobin on the question of majority or of proven majority?

A. On the morning of the strike? You want that for the morning of the strike?

Q. Was that one of them?

A. That's the morning of the strike as well. I just testified that on the morning of the strike when I approached Mr. Tobin I spoke to him. What I said I told you just a minute ago, and that was the man's direct answer to me. "I told you before, unions are not for driver-salesmen. They are for carpenters, plumbers, bricklayers, electricians, and so on."

Q. Did you in that conversation anywhere say anything about a cross check or Board election?

A. I did, sir. I asked him for recognition—to let the Board decide on what they wanted to do.

* * * * * * * *

[292] (By Mr. Pate):

Q. Mr. Lunin, will you start the first of that conversation and give it to us, and show us where that statement was made in the conversation?

A. Well, it was made in the course of the conversation. I just couldn't recall in front of what words I put it or after what words I put it; but it was definitely put in there, that I would let the NLRB decide. All we wanted was recognition.

Mr. Pate:

That is all.

Further Cross Examination.

(By Mr. Constangy):

Q. Mr. Lunin, you made that last statement that you just referred to—when you made that last statement, did Mr. Tobin dispute your majority?

A. At that time?

Q. Yes, sir.

A. Not exactly dispute it.

Q. What did he say?

A. He said, "I told you that unions are not for driver-salesmen. They are for carpenters, bricklayers, plumbers, electricians, and the like."

Q. Didn't he say, "I told you I wouldn't recognize you"?

[293] A. Yes, sir.

Further Direct Examination.

(By Mr. Pate):

Q. Mr. Lunin, from whom did you receive the applications that were signed by the various driver-salesmen?

A. Mr. Freeman.

Q. Did you take any of them directly from employees?

A. Wel, I took some at the meeting.

Q. Did any employees of the Seven Up Bottling Company, except driver-salesmen, attend any of those meetings that you testified about?

A. No, sir.

Q. Did you yourself ever take any applications from employees other than driver-salesmen?

A. No, sir.

Q. Did you receive any cards that were signed by employees [294] other than driver-salesmen?

A. No, sir.

Q. Did you receive any cards that were signed by employees other than driver-salesmen?

A. Yes, sir.

Q. From whom did you get those?

A. From Mr. Reilly.

Mr. Constangy:

From whom?

The Witness:

Mr. Reilly.

(By Mr. Pate):

Q. When did you get those cards from Mr. Reilly?

A. I believe it was the day after the strike that I got some cards.

Q. Did you get any from Mr. Reilly before the strike?

A. No, sir.

Q. Were you with Mr. Reilly when he received any of those cards from employees?

A. No, sir.

. . . . . .

[297] Trial Examiner Hunt:
On the record.

MARVIN LESLIE WALLS a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Hunt:
I will ask you to keep your voice up, and give us your full name and address.

The Witness:
Marvin Leslie Walls, 2185 North West Fifty-Seventh Street.

Direct Examination.

* * * * * * * *

Q. Have you ever worked for the Seven Up Bottling Company at Miami?
[298] A. Yes, I did.
Q. Do you work there now?
A. Not now.
Q. When did you go to work there?
A. The first of August, 1948.
Q. How long did you work there?
A. Approximately a month.
Q. What work did you do during that time?
A. Driver-salesman.
Q. Did you become a driver-salesman immediately after you went to work?

A. Not immediately. Nor for about four days. I was in training for about four days, and thereafter I was on my own as a salesman.

. . . . . .

[299] Q. At any time after you went to work for the Seven Up Bottling Company, did you join a labor organization or sign an application for membership in a labor organization?

A. Yes, I did.

Q. What organization was that?

A. That was the A. F. of L. Teamsters, 390.

Q. Did you sign a card?

A. Yes, I did.

. . . . . .

Mr. Pate:

I will ask that the reporter mark as General Counsel's Exhibit 8 for identification this card headed "Application for Membership" and purporting to bear the signature of Marvin L. Walls.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 8 identification.)

[300] (By Mr. Pate):

Q. Mr. Walls, I hand you General Counsel's Exhibit 8 for identification, and I ask you if that is your signature at the bottom of this card, where the words "Marvin L. Walls" appear.

A. Yes.

Q. Who filled out that card?

A. I filled it out.

Q. I call your attention to the entry in pencil opposite the printed word "Date" where the figures "8/15/48" appear.

A. Yes, sir.

Q. Do you know who made that entry?

A. Yes, sir, I did.

Q. Is that the date when you actually signed the card?

A. Yes.

. . . . . .

[301] Q. After you signed this card, or before you signed it, did you attend any union meetings?

A. I did, after I signed the card.

Q. After you signed the card?

A. Yes, sir.

Q. Approximately how many did you attend

A. Approximately three meetings. At least three, and probably four.

Q. Over what period of time were those meetings held?

A. Over a period of about three weeks, I would say.

. . . . . .

[303] Q. Do you remember the day when the driver-salesmen did not report for work in the morning?

A. Yes. That was the day after Labor Day. I believe it was September 7, 1948.

Q. Did you attend any kind of meeting that morning?

A. That morning we met at the union hall, the Laundry Workers Hall, at seven o'clock.

[304] Q. And you attended the meeting?

A. I attended the meeting.

Q. About how long did that meeting last?

A. Just for about ten minutes.

Q. After the meeting broke up, what did you do?

A. We went down to the plant about a block away.

Q. Did you go to work?

A. No, we didn't go to work. We only went across the street from the plant.

Q. Did anybody go over to the plant that morning?

A. Mr. Lunin, Mr. Reilly, and the four men on the committee.

Q. How soon was that after you arrived at the plant?

A. Immediately.

Q. Did you see where they went?

A. They went inside the plant.

Q. Did you see them after they went into the plant?

A. I don't believe I did at that time.

Q. How long were they there?

A. I would say for five or ten minutes.

Q. What did they do then?

A. They came out, and told us that—I believe they talked to Mr. Dismukes at the time, and he told them they couldn't—that he couldn't—do anything about it—that they wouldn't be interested in talking to the union representatives about it, and the word we got was that he had notified Mr. Tobin and he [305] was on his way down.

Q. Who made the report to you at this time?

A. It was either Mr. Lunin or Mr. Freeman.

Q. And did Mr. Tobin arrive that morning, or did you see him?

A Shortly after—about half an hour later.

Q. Did anybody go back to the plant then?

A. The committee and Mr. Lunin and Mr. Reilly went back.

Q. Did you see where they went about the plant?

A. They went inside the plant.

Q Did you see them after they went inside?

A. I believe I saw them talking.

Q. And who was present there besides Mr. Lunin, Mr. Reilly, and the four committeemen that you named?

A. Mr. Dismukes and Mr. Tobin.

Q. About how long did that conversation last?

A. Well, fifteen minutes or half an hour, I'd say.

Q. Then what did Mr. Lunin, Mr. Reilly and these employees with them do?

A. They came out of the plant. Mr. Reilly and Mr. Lunin and the committee came out of the plant and told us Mr. Tobin had refused to accept the union—didn't want the union to represent us—that unions were all right for somebody else but they didn't want to be bothered with it.

Q. Who made that statement?.

[306] A. Mr. Tobin was presumed to have made it.

Q. I mean who made it to you and the other drivers?

A. Mr. Lunin, I think, told us that.

Q. Was that made in the presence of the other sales drivers?

A. In the presence of everyone..

Q. Did you yourself ever serve on the picket line during the strike?

A. Yes, I did.

* * * * * * * *

[310] Q. Have you ever worked for the Seven Up Bottling Company since the day that the strike

began?

A. I have not.

* * * * * * * *

[333] So I now offer in evidence General Counsel's Exhibit 8 for identification.

Trial Examiner Hunt:

I will receive it.

(The document heretofore marked General Counsel's Exhibit No. 8 for identification was received in evidence.)

* * * * * * * *

[334] JAMES PAUL YOST a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Hunt:

Be seated, and give us your full name and address.

[335] The Witness:

James Paul Yost.

* * * * * * * *

Direct Examination.

(By Mr. Pate):

Q. Mr. Yost, have you ever worked for the Seven Up Bottling Company of Miami?

A. I have sir.
Q. Do you work there now?
A. I do not.
Q. When did you first go to work there?
A. In March of 1948.
Q. How long did you continued to work there?
A. Approximately six months.
Q. What was your job when you first started working for the Seven Up Bottling Company?
A. For two weeks I was a trainee.
Q. Where were you trained?
A. On the truck, as a driver-salesman.
Q. And after those two weeks, what did you do?
[336] A. I became a driver-salesman.
Q. Did you continue to be a driver-salesman the rest of the time you worked there?

* * * * * * * * *

[337] Q. At any time after you went to work for the company did you join or apply for membership in a labor organization?
A. After I went to work?
Q. To work for Seven Up.
A. Yes, I did.
Q. What organization was that?
A. Local 390 of the Teamsters Union, American Federation of Labor.
[338] Q. Did you ever sign a card with that union?
A. Yes, I did.
Q. Where did you get the card?
A. The actual application card?
Q. Yes, the blank form.
A. I got that from Mr. Freeman.
Q. And what did you do with it after you signed it?
A. Well, it in turn was turned over to Mr. Lunin.

Q. What did you do with it yourself?
A. What did I do with it?
Q. Who did you give it to?
A. The application itself?
Q. Yes.
A. I gave it to Mr. Freeman, as far as I can recall.
Q. Was that the same day you got it from Mr. Freeman, or some other day?
A. On the same day.

Mr. Pate:
I will ask that the reporter mark as General Counsel's Exhibit 9 for identification, this card which purports to be an application for membership, signed by James P. Yost.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 9 for identification.)

Trial Examiner Hunt:
What is the date of it, please?

Mr. Constangy:
August 18, 1948.

Mr. Pate:
August 18, 1948.

[339] (By Mr. Pate):
Q. Mr. Yost, I hand you General Counsel's Exhibit 9 for identification, and ask you if that is your signature appearing on the bottom line of this card?
A. It is, including the rest of the script.

. . . . . .

Q. Did you insert the date?

A. Yes, I did.

[340] Q. And is that the date on which you actually signed the card?

A. It is.

Q. Mr. Yost, after you signed this application card that I have just shown you, did you ever have any conversation with Mr. Carnifax in which the union was mentioned in any way?

A. Yes, I did.

Q. When did that occur?

A. I spoke to Mr. Carnifax several times informally. One time specifically that I spoke to him was with Mr. Shannon, in regards to reinstatement of our jobs.

Q. Before the strike actually took place, did you ever have any conversation with Mr. Carnifax in which the union was discussed or mentioned?

A. I am quite sure I did, yes.

Q. Do you remember whether you did or whether you didn't?

A. Whether I had a conversation with Mr. Carnifax?

Q. Yes.

A. Yes, I did.

Q. When did that conversation occur?

A. To the best of my knowledge it occurred Saturday—the Saturday previous to the actual strike.

Q. Was it after you signed your application card which has just been identified by you?

A. I believe it was, yes.

[341] Q. Where was the conversation?

A. It was after I had signed my application card, because the card is dated August 18, and this was only a few days before the strike.

Q. Where did it take place?
A. The conversation?
Q. Yes.
A. It took place in the plant of Seven Up.
Q. Who was present at that time?
A. To the best of my knowledge, Mr. Shannon was.
Q. Mr. Shannon and you and Mr. Carnifax?
A. That's right.
Q. Anyone else?
A. Not that I recall.
Q. Will you relate that conversation to us, telling us what each of you said?
A. Generally speaking, we were speaking about the union and the fact that Mr. Tobin, Mr. Shannon Tobin, wouldn't meet with our duly elected representative.
Q. Who was talking about that?
A. Mr. Shannon was.
Q. All right. Did Mr. Carnifax have anything to say?
A. He said as far as the information he had was concerned, that was correct—that he would in no way recognize the union.
Q. Did he have anything else to say on that occasion, that [342] you remember?
A. Not that I recall. That was the principal topic of conversation.
Q. Did you attend any union meetings?
A. Three, to the best of my knowledge.
Q. Approximately when was the first one in respect to the time when you signed this application card?
A. The first meeting I attended?
Q. Yes.
A. To the best of my knowledge, it was two to three weeks prior to the actual strike.
Q. And where was that held?

A. That was held at the hall on North Miami Avenue. I forget the exact address.

Q. Can you tell me what business was taken up at that particular meeting?

A. At that meeting?

Q. Yes.

A. Generally, the main topic of business was that the members sign up for the union—in other words, the employees.

Q. And after that meeting, when was the next meeting held?

A. The Sunday prior to the strike.

Q. Was that in the same place?

A. The same place, yes.

Q. Can you tell me briefly what business was taken up at [343] that meeting?

A. At that particular meeting a strike vote was taken.

Q. In what manner was it taken?

A. It was a written ballot, on little pieces of paper.

Q. Did you participate in the counting of the votes?

A. I did not.

Q. Was the result announced?

A. It was.

Q. What was it?

A. It was 100 per cent for the strike.

Q. What was the question that was put to the men to vote on, do you remember that?

A. You mean for the actual vote?

Q. Yes. What was the question that you were voting on?

A. The question was if Mr. Tobin didn't recognize an elected representative as our bargaining agent and would not meet with him and talk with him, would we go on strike or not.

Q. Was any committee elected or appointed either at that meeting or at some other meeting?

A. It was appointed at that meeting.

Q. Who was on the committee?

A. Ted Shannon, Walter Croon, and Nat Freeman.

Q. How were these men elected or appointed?

A. To the best of my knowledge it was by agreement among the rest of the employees.

[344] Q. After that time did you attend any other meeting?

A. We attended a meeting on the day of the strike.

Q. After that meeting was over, what did you do?

A. We proceeded to the Seven Up plant.

Q. Was that in the morning, before working time?

A. It was about twenty of seven, I believe, or a quarter of seven.

Q. Was that when you went to the plant or when the meeting started?

A. When the meeting took place.

Q. At what time did you go to the plant?

A. It was approximately twenty minutes after seven, or seven-thirty.

* * * * * * * *

[346] Q. Did you ever, after the time the strike started, talk to anyone with the company, Mr. Tobin or Mr. Dismukes or anybody else, about going back to work?

A. I spoke to Mr. Carnifax about going back to work.

Q. When did you speak to Mr. Carnifax?

A. Thursday of the same week in which the strike took place.

Mr. Constangy:
Did you say Thursday?

The Witness:
I beg your pardon?

Mr. Constangy:
Did you say Thursday of the same week in which the strike took place?

The Witness:
Yes, I'm quite sure it was Thursday of that week.

(By Mr. Pate):
Q. You say it was Thursday?
A. Thursday.
Q. Where did you see him?
A. Around the corner from the Seven Up office on Seventeenth Street, North West Seventeenth Street.
Q. Was anyone with you at the time?
A. Mr. Shannon was.
Q. Was anyone present other than you and Mr. Shannon and Mr. Carnifax?
[347] A. No one else.
Q. Tell us just what the conversation was that you had on that occasion.
A. Well, the essence of the conversation—in fact, the entire conversation centered on whether Mr. Tobin would eventually meet with our representative and recognize the union, and whether he would reinstate the men that were striking. Mr. Carnifax said that they would not reinstate anyone, with the possible exception of one or two.
Q. Was that all the conversation?
A. Outside of the fact that Mr. Carnifax said that he would not recognize the union, and would not meet

with the union, and did not want any part of the union in his business establishment; and also the fact that he would not reinstate any of the employees. That was all of the conversation.

Q. Did Mr. Carnifax make that statement?

A. He did.

Q. When Mr. Carnifax used the pronoun "he", to whom was he referring?

A. To Mr. Sherman Tobin.

• • • • • • • • •

[350] (By Mr. Pate):

Q. You have not worked for the company since that time, since the time the strike started?

A. No, sir, I haven't.

• • • • • • • • •

[359] Mr. Pate:

At this time I will offer in evidence General Counsel's Exhibit 9 for identification.

Mr. Constangy:

We have no objection, Mr. Examiner.

Trial Examiner Hunt:

The same is received.

(The document heretofore marked General Counsel's Exhibit No. 9 for identification was received in evidence.)

• • • • • • • • •

[360] WALTER CROON a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Hunt:

Be seated. Give us your full name and address.

The Witness:

Walter Croon, 7801 North West Eighth Court, Miami.

Direct Examination.

* * * * * * * *

Q. Have you ever worked for the Seven Up Bottling Company of Miami?

A. Yes, sir.

Q. Do you work there now?

A. No, sir.

Q. When did you first go to work there?

A. I beg your pardon?

Q. At what time did you first go to work for the Seven Up Bottling Company?

A. In June.

[361] Q. What year?

A. 1948.

Q. How long did you continue to work there?

A. Until September 7, 1948.

Q. During that period, what was your job?

A. Driver-salesman.

* * * * * * *

[362] Q. During the time that you were working for the company, did you ever join a labor organization or apply for membership in a labor organization?

A. I did, around August.
Q. Did you sign a union card?
A. Did I sign a union card?
Q. Yes.
A. I did.
Q. Do you know what organization that was?
A. Teamsters, Local 390.

* * * * * * * *

Mr. Pate:
I will ask that the reporter mark as General Counsel's Exhibit 10 for identification, this card that purports to be an application for membership, signed by Walter Croon, and dated August 10, 1948.

[363] (Thereupon the document above referred to was marked General Counsel's Exhibit No. 10 for identification.)

(By Mr. Pate):
Q. Mr. Croon, I hand you General Counsel's Exhibit 10 for identification, and ask you if the name "Walter Croon" appearing on the bottom line is your signature.
A. Yes, sir.

* * * * * * * *

Q. What about the date?
A. I filled in the date.
Q. The date is 8/10/48?
A. That is correct?
Q. Is that the day that you actually signed the card?
A. Yes, sir.

Q. After you signed this card, Mr. Croon, did you ver [364] attend any union meetings?

A. I did, sir.

Q. When was the first meeting that you attended?

A. I don't rightly recall exactly just when or just vhat date it was.

Q. Was it after you signed the card?

A. Yes, I believe it was. I'm not certain. I couldn't swear to it. I don't really know whether it was before or afterwards.

Q. Was it close to the time that you signed the card?

A. Yes, sir, it was.

Q. Where was it held?

A. At the Laundry Workers Hall.

Q. Was it attended by driver-salesmen of the Seven Up Bottling Company?

A. Yes, sir.

Q. Mr. Lunin and Mr. Reilly?

A. Yes, sir.

Q. Do you remember generally what business was taken up at that first meeting?

A. It was a general discussion, as I recall. I couldn't say anything definite.

Q. Pertaining to the union and organization?

A. That's right.

Q. After that time did you attend any other meetings?

[365] A. I did, sir.

Q. Approximately when was the second meeting that you attended?

A. I guess—well, it's hard to say. But I think it was just a little while before we went out on strike.

Q. Would that have been in August 1948?

A. No, September.

Q. The strike was in September.

A. August. Yes, sir.

Q. It was August?

A. It was in August?

Q. Was that held in the same place?

A. Yes, sir.

Q. Do you remember briefly what business was taken up at that meeting?

A. If I recall correctly, I think we had the nomination of committeemen.

Q. Was a committee elected?

A. A committee was elected.

Q. Can you tell us who wa son that committee?

A. To the best of my knowledge it was myself, Mr. Freeman, and Mr. Shannon. I don't recall whether Mr. Klein was on the committee or not.

Q. Either at that meeting or at some other meeting was there a strike vote taken?

[366] A. Yes, sir, there was.

Q. Were you present at ! at time?

A. Yes, sir.

Q. Was that the same meeting, or some other meeting?

A. I believe it was the meeting after that.

Q. Was that one held at the same place?

A. The same place.

Q. How long was that before the strike actually occurred?

A. I imagine a couple of days.

Q. Can you tell us what the vote was?

A. It was a unanimous vote. The men wanted recognition from the company or else they would strike.

Q. Did you count the ballots?

A. I helped.

Q. Was that a written vote?

A. That was a written vote.

Q. After that time was there another meeting held?

A. There was a meeting held before we went out on strike.

Q. How long before?

A. I guess an hour or so.

Q. The same day?

A. The same day.

Q. Was that held at the same place where the other meetings were held?

A. Yes, sir.

[367] Q. Do you remember how many of the driver-salesmen attended that meeting?

A. I believe they were all there with the exception of one that was out of town.

Q. Is that Mr. Wood that you are referring to?

A. That's right, sir.

Q. Was Mr. Nelson there?

A. No, sir. Mr. Nelson was not there. If I am not mistaken, he was supposed to be in a supervisory capacity.

Q. But he wasn't there, in any event?

A. No, sir.

Q. Did he work on a truck?

A. He did.

Q. Did you know all the men at that time who went out on the trucks?

A. Yes, sir. I'm pretty sure I did.

Q. Were there any others besides Mr. Wood and Mr. Nelson who were not at that meeting?

A. I don't recall at the moment. I believe they were all there but Mr. Nelson and Mr. Wood.

Q. Did you yourself go out on strike?

A. Yes, sir.

Q. Did you serve on the picket line during the strike?

A. Yes, sir.

Q. About how often?

[368] A. Whenever necessary. Every two hours—every hour. Whenever it was necessary.

Q. About how many days?

A. A little more than a week, I'd say. Somewhere around there.

Q. Were there any driver-salesmen or other men who worked on the trucks who did not go on strike and serve on the picket line?

A. No, sir.

Q. They all did?

A. They all served on the picket line.

Q. Did all of them go on strike?

A. All with the exception of Mr. Wood and Mr. Nelson, whom I mentioned a moment ago.

Q. Did Mr. Wood ever join the group later?

A. Yes. When he came back we spoke to him for a few minutes in the morning.

Q. But did he report for work or did he stay out?

A. He did. He reported for work.

Q. After you left the meeting on the morning that the strike began, where did you go?

A. Say that again, please.

Q. You testified before about a meeting you had on the morning of the strike.

A Yes, sir.

[369] Q. Where did you go after that meeting?

A. We went direct to the plant.

Q. Where did the men go after they reached the plant?

A. Across the street from the plant.

Q. Then after you got there, will you tell us what happened?

A. The committee went in with Mr. Reilly and Mr. Lunin to see Mr. Tobin, but Mr. Tobin wasn't there. Just Mr. Dismukes was.

Q. When you say the committee, to whom are you referring?

A. Mr. Shannon, myself, and Mr. Freeman.

Q. You have already named Mr. Reilly and Mr. Lunin who were with you.

A. That's right.

Q. And where did you see Mr. Dismukes?

A. Inside the plant.

Q. Did any of you have a conversation with Mr. Dismukes there?

A. Mr. Lunin and Mr. Reilly did.

Q. Will you tell us what was said by each of them and by Mr. Dismukes?

A. They asked to see Mr. Tobin. Mr. Dismukes' reply was that Mr. Tobin wasn't in, that he would get in touch with him.

Q. Do you remember whether there was any further conversation?

A. No, sir.

[370] Q. What did your group do then?

A. We went outside and waited for Mr. Tobin to come in.

Q. And rejoined the men across the street?

A. That's right.

Q. Did Mr. Tobin arrive?

A. Mr. Tobin arrived about fifteen or twenty minutes later.

Q. What did you do then?

A. The committee went back in again.

Q. This same group who went the first time?

A. That's right.

Q. Did you see Mr. Tobin that time?

A. Yes, sir.

Q. Where did you see him?

A. Inside the plant.

Q. Was anyone with Mr. Tobin at the time?

A. Mr. Dismukes.

Q. Will you relate for us the conversation that occurred at that time, telling us what each person said?

A. Well, Mr. Lunin was doing the talking, and as far as I can recall, Mr. Tobin was asked if he would recognize the union. He was told that the men refused to go back unless they recognized the union, and to let things go through the normal procedure, and just so long as the company recognized the union, the men would go back to work.

Q. Who made that statement?

[371] A. Mr. Lunin said that to Mr. Tobin.

Q. Did Mr. Tobin make a reply?

A. Mr. Tobin did reply.

Q. What did he say?

A. Just what the reply was, I don't recall exactly.

Q. Do you recall the substance of it.

A. I recall part of it. I recall Mr. Lunin asking Mr. Tobin why he was so prejudiced against the union. Mr. Tobin said he wasn't prejudiced. He said he believed in unions but not so far as the Seven Up drivers were concerned. He believed in unions for carpenters and truck drivers and things like that, but not whether the drivers of Seven Up were concerned.

Q. Do you remember anything else that was said on that occasion?

A. No, sir.

Q. After that conversation, what did you, the rest of the committee, and Mr. Lunin and Mr. Reilly do?

A. We left, sir, and relayed it to the men outside, across the street.

Q. Did you tell them what had happened?

A We told them what had happened—what the conversation was.

Q. How long after that was it that the picket line was set up?

A. Possibly an hour; maybe half an hour.

* * * * * * * * *

[374] Q. After that time did you have a conversation with either Mr. Dismukes or Mr. Sherman Tobin?

A. As I recall, there was Mr. Reilly, myself, and Mr. Klein, I believe, and Mr. Freeman. We went in the office one day. Mr. Tobin was in there.

Q. How long was this after the conversation with Mr. Dismukes?

A. I don't recall whether it was at the end of the week or whether it was at the beginning of the week.

[375] Q. You mean the beginning of the next week or the same week?

A. The beginning of the next week or the ending of the first week.

Q. Was Mr. Shannon in that group?

A. I couldn't say definitely. I wouldn't recall exactly.

Q. Where did you see Mr. Tobin?

A. In the office.

Q. Was anyone else there with him other than the group that went with you?

A. Not that I recall, except the office boy—the office man—whatever he was—I don't know what he was.

Q. Did he take any part in the conversation?

A. No, sir.

Q. Will you relate the conversation for us, telling us what you said to him and what Mr. Tobin said to you?

A. Well, Mr. Tobin was asked if the men couldn't go back to work until things were settled by the Labor Relations Board.

Q. You mean he was asked by one of your group?

A. Yes, sir.

Q. What did he say?

A. By one of our group, yes.

Trial Examiner Hunt:

Do you know which one?

The Witness:

I'm not certain just exactly who it was, no, sir.

[376] Trial Examiner Hunt:

All right.

The Witness:

And Mr. Tobin's reply was that he didn't want to have anything to do with the union or anyone connected with it.

(By Mr. Pate):

Q. Was there any further conversation at that time that you remember?

A. That's all.

Q. That's all he said, as far as you remember?

A. That's all I remember.

Q. Did you and the men with you leave then?

A. Yes, sir.

Q. Did you report to the other men what had happened?

A. We did.

Q. Since that time have you had any conversation with Mr. Tobin or anyone connected with the company about going back to work?

A. No, sir.

Q. And you have not worked for the company since that time?

A. No, sir.

Mr. Pate:

That is all.

Cross Examination.

* * * * * * *

[395] Q. All right. Now then, you say you had another conversation at the office with Mr. Sherman Tobin, I believe?

A. Yes.

* * * * * * * *

[396] Q. What was said by your group to Mr. Tobin, and who said it?

A. I don't know who said it.

Q. What was said?

A. It may have been Mr. Shannon, it may have been Mr. Reilly.

Q. But it wasn't you?

A. No, sir, I was in on the conversation.

Q. But you weren't doing the talking?

A. No, sir.

[397] Q. What was said?

A. Mr. Tobin was asked if he wouldn't put the men back to work and let things go through the normal channels—let the Labor Relations Board take care

of things, and the men go back to work in the meantime.

Q. What did he say?

A. His reply was no.

Q. His reply was no?

A. He said he didn't want to have anything to do with the union.

* * * * * * * *

[399] Mr. Pate:

Mr. Examiner, I will offer in evidence General Counsel's Exhibit 10 for identification.

Mr. Constangy:

No object.

Trial Examiner Hunt:

Same is received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 10 for identification was received in evidence.)

* * * * * * * *

NAT FREEMAN a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

[400] Trial Examiner Hunt:

Be seated. Give us your full name and address, please.

The Witness:
Nat Freeman, 750 Pennsylvania Avenue, Miami Beach.

Direct Examination.

* * * * * * * *

Q. Mr. Freeman, have you ever worked for the Seven Up Bottling Company of Miami?
A. Yes; sir.
Q. Do you work there now?
A. No, sir.
Q. When did you go to work for this company?
A. I don't know exactly.

Mr. Constangy:
If it will help, we can stipulate. Our records show June 7, 1948.

Mr. Pate:
June 7, 1948?

Mr. Constangy:

Yes.

Mr. Pate:
Does that sound right to you?

The Witness:
That's about right.

Mr. Pate:
We will stipulate that that is the correct date.

(By Mr. Pate):

Q. How long did you continue to work there?

A. Several months.

[401] Q. When was the last time you worked there?

A. When we went out on strike.

Q. Up until the strike of September 1948?

A. That's right.

Q. What was your job during that period?

A. Route salesman.

* * * * * * * *

[403] Q. At any time after you went to work with the company, did you join or sign an application for membership in a labor organization?

A. Will you repeat that question, please?

Q. At any time after you started working for the Seven Up Bottling Company, did you join a labor organization or sign an application card for membership in a labor organization?

A. I did.

Q. What organization was that?

A. The Teamsters Union, connected with the American Federation of Labor.

Q. Had you had some contact with that union before you actually signed your card?

A. No.

Q. When did you first have some contact with the Teamsters Union in Miami?

A. When we started to have the trouble with the company—when they split our routes.

Q. Approximately when was that?

A. Sometime in July, I think.

Q. Of 1948?

A. 1948.

* * * * * * * *

[404] Q. Mr. Freeman, in the Summer of 1948, did you have some occasion to get in touch with Mr. Lunin?

A. Yes.

Q. When was that?

A. I don't remember exactly.

Q. Approximately.

A. July of 1948.

Q. How did you get in touch with him?

A. When our employer split our routes. The boys became dissatisfied.

Q. I say how did you get in touch with him?

A. I called his office.

Q. On the phone?

A. That's right.

* * * * * * * *

[408] Mr. Pate:

I will ask that the reporter mark as General Counsel's Exhibit 11 for identification, the application for membership that purports to be signed "Nat Freeman, and dated August 16, 1948.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 11 for identification.)

Mr. Pate:

And as General Counsel's Exhibit No. 12 for identification, the card purporting to be the application for membership signed by R. D. MacCubbin, dated August 10, 1948.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 12 for identification.)

Mr. Pate:

And as General Counsel's Exhibit No. 13 for identification, the card dated August 10, 1948, purporting to be signed by Clifford H. Voight, Jr.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 13 for identification.)

Mr. Pate:

And as General Counsel's Exhibit No. 14 for [409] identification, the card dated August 16, 1948, purporting to be signed by William G. Wood.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 14 for identification.)

* * * * * * * * *

Mr. Pate:

As General Counsel's Exhibit No. 16 for identification, an undated card, purporting to be signed by Charles F. Fisher.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 16 for identification.)

Mr. Pate:

And as General Counsel's Exhibit No. 17 for identification, the card dated August 31, 1948, purporting to be signed by Robert Studley.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 17 for identification.)

* * * * * * * *

Mr. Constangy:

Mr. Reporter, will you identify these two cards as Respondent's Exhibits 1 and 2. Respondent's Exhibit No. 1 will be a card dated 9-7-48, purporting to be signed "Erving Alfred Hanna".

(Thereupon the document above referred to was marked Respondent's Exhibit No. 1 for identification.)

Mr. Constangy:

Respondent's Exhibit No. 2 is a card dated 9-7-48, purporting to be signed "Henry Allen Tripp".

(Thereupon the document above referred to was marked Respondent's Exhibit No. 2 for identification.)

* * * * * * * *

[464] I received in evidence all of the exhibits offered by General [465] Counsel, except No. 16, upon which I reserve ruling, and No. 15 was not offered, Mr. Reporter.

Let's see. That would be—was 11 the first of your offer?

Mr. Pate:

11 through 17.

Trial Examiner Hunt:

All right. Then I would be receiving 11, 12, 13, 14, and 17.

(The documents heretofore marked General Counsel's Exhibits Nos. 11, 12, 13, 14, and 17 for identification, were received in evidence.)

* * * * * * * *

[469] FRANCIS J. REILLY a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Hunt:

Give us your full name and address, please.

The Witness:

Francis J. Reilly, 544 North West 23rd Court.

Direct Examination.

(By Mr. Pate):

Q. Mr. Reilly, are you connected with Local 390 of the Teamsters Union?

A. Yes, sir.

Q. In what capacity?

A. President.

Q. How long have you held that position?

A. Approximately three years.

Q. As president of Local 390 did you ever do any organizational work among employees of the Seven Up Bottling Company of Miami?

[470] A. Yes sir.

Q. Approximately when did that organizational work occur?

A. Approximately in July of 1948.

Q. Did you about that time attend any meetings held by the union for employees of that company?

A. Around August 1 of 1948.

Q. How many meetings did you attend?

A. I think it was three or four. I forget just which.

Q. Where were those meetings held?

A. 3502 North Miami Avenue.

Q. They were all held at the same place?

A. Yes, sir.

Q. Can you tell us when the last of those meetings was held?

A. Yes, sir, the day after Labor Day, about six-thirty or a quarter to seven in the morning.

Q. By whom was that meeting attended?

A. I think ten drivers of the Seven Up Bottling Company, myself, and Mr. John Lunin, our secretary-treasurer.

Q. At any of these meetings that you have mentioned, do you remember whether there was a strike vote taken?

A. Not at that meeting. The meeting before that one.

Q. About how long before this last meeting was the one where the strike vote was taken?

A. Approximately a week.

Q. That was held at the same place?

[471] A. Yes, sir.

Q. By whom was that meeting attended?

A. The same drivers, myself, and Mr. Lunin.

Q. Can you tell us how that vote was taken?

A. The question was put: If it becomes necessary, will you fellows go on strike? Answer yes or no. There were paper ballots handed out. I mean by that we just tore up scrap paper and handed it out. Me and Mr. Lunin left the room. The boys marked the papers, folded them, and placed them in a little box that John had supplied, and when they were finished we went back into the room. That is, I did.

Q. Were you there when they were counted?

A. I was. Mr. Lunin wasn't.

Trial Examiner Hunt:

What is the answer?

The Witness:

I said I was there, but that Mr. Lunin was not

(By Mr. Pate):

Q. You mean he stayed out?

A. He was in the little office off on the side.

Q. Did you take any part in the counting?

A. I just stood and watched.

Q. Did you see the ballots?

A. Yes.

Q. What was the result?

A. They were all marked "yes".

Q. At that meeting had Mr. Lunin made any report to the men [472] there about his efforts to meet with the company?

A. Yes, sir.

Q. Do you remember generally what he said?

A. Yes, sir.

Q. What did he say?

A. He reported that he had tried to contact the company several times by phone, and was unsuccess-

ful. Then he wrote a registered letter with a return receipt requested. The letter was never answered, although we did get the receipt back. He finally succeeded in contacting Mr. Tobin—I think it was Mr. Tobin, Jr.—and at that time Mr. Lunin reported that Mr. Tobin said he wanted nothing to do with the union, and furthermore he didn't believe that we had the employees organized; but even if we did, he still didn't want any union in his line of business.

Q. At any of these meetings that you have mentioned, was there a committee of some kind appointed or elected?

A. Mr. Freeman was elected temporary shop steward.

Q. Tell us what meeting that was.

A. That was the second meeting we held.

Q. Was that the same one where the strike vote was taken, or another meeting?

A. I don't believe it was. I believe it was a meeting before that.

Mr. Constangy:

A meeting before what?

[473] (By Mr. Pate):

Q. Before which one?

A. Before the strike vote was taken.

Q. A meeting earlier than the one where the strike vote was taken?

A. That's right.

Q. And who was named to that committee?

A. Mr. Freeman was named as temporary shop steward. He was voted by the boys to be temporary shop steward.

Q. Do you remember whether anyone else was elected as a committeeman?

A. Yes, sir. I remember Shanahan or Shannon. And Walter Croon. They were elected to negotiate with the company, if we succeeded in sitting down with them.

Q. To go back to the meeting on the day after Labor Day, how long did that meeting last?

A. I would say approximately twenty minutes to half an hour.

Q. At the conclusion of that meeting, what did you do?

A. We left and walked out to the company, which is about two blocks distance—a distance of two, maybe two and a half blocks.

Q. Who walked down to the company?

A. Myself, Mr. Lunin, and all the drivers.

Q. After you got to the plant, where did the drivers go?

A. They walked across the street from the plant.

Q. Did you go there too?

[474] A. Temporarily, yes, sir.

Q. When you say temporarily, where did you go next?

A. We went into the plant, myself and Mr. Lunin, and Nat Freeman, and there was somebody else with us, but I just can't remember who, and we contacted a Mr. Dismukes.

Q. Where did you see him?

A. I would say twenty-five or thirty feet inside the plant door.

Q. Was anyone there with Mr. Dismukes?

A. No, sir, not at that time.

Q. Was there any conversation there between any of your group and Mr. Dismukes?

A. Yes, sir.

Q. Will you relate that conversation for us, telling us what each man said?

A. Mr. Lunin asked if Mr. Tobin was in, and he said no, he wasn't, and Mr. Lunin asked if he would contact Mr. Tobin, because the boys were not going to work until we could get a definite answer from Mr. Tobin, either to recognize us or wait for an NLRB decision, and he said he would do that.

Q. Was that the substance of the entire conversation?

A. Yes, sir, as far as I can remember.

Q. What did you and the group with you do at the end of that conversation?

A. We left the building, and walked back across the street [475] and John reported to the rest of the drivers what had gone on.

Q. How long did you remain across the street?

A. I imagine half an hour or three-quarters of an hour.

Q. Where did you go at the end of that time?

A. About that time Mr. Tobin drove into the backyard, and we waited a couple of minutes and then we entered the building again.

Q. Did you see Mr. Tobin?

A. Yes, sir.

Q. Where did you see him?

A. Approximately the same spot where we had met Mr. Dismukes.

Q. Who went with you that time?

A. Myself, Mr. Lunin, Nat Freeman, and Walter Croon.

Q. Was anyone with Mr. Tobin?

A. Yes, sir, Mr. Dismukes.

Q. Was there any conversation at that time between any member of your group and either Mr. Dismukes or Mr. Tobin?

A. Between Mr Tobin and Mr. Lunin, yes, sir.

Q. Will you relate that conversation for us, telling us what each one of them said?

A. Mr. Lunin asked Mr. Tobin if he would recognize the union or if he would wait for a decision from the NLRB, and if he would promise him that he would send the men back to work as of then. At that time Mr. Tobin said he didn't believe in a union in his line of business, although he did believe in unions in [476] other crafts, but that unions had no right or did not belong in the driver-salesman industry.

Q. Was there any other conversation had then that you remember?

A. Yes, Mr. Lunin told him the men wouldn't go back to work until we heard from the NLRB or he decided to give us a consent election or the NLRB stepped into the picture.

Q. Do you remember whether Mr. Tobin made any reply to that statement?

A. Mr. Tobin replied that he didn't care anything about it because he just wasn't going to recognize any union, and he didn't care if he got any part of the men back or not—there were only one or two of them worth having back anyway.

Q. During that conversation—Strike that. Was there anything else said during that conversation, that you remember?

A. Not just offhand.

Q. Was anything said about proving the union's majority that you remember?

A. Mr. Lunin offered to prove the union's majority.

Q. Did he state how he would prove it?

A. Yes. He stated that if he would sign a stipulation to recognize the union, he would show him the

cards, or he could call on the NLRB and consent to an election and prove it with an election.

Q. Did Mr. Tobin make a reply to that suggestion?

[477] A. Yes, sir, he stated he definitely did not want anything to do with the union.

Q. Do you remember anything else that was said during that conversation?

A. No, sir, I don't.

Q. About how long did the conversation last?

A. Oh, I'd say ten minutes.

Q. What did you and the group with you do at the end of that conversation?

A. Went back across the street and reported to the boys.

Q. Who made the report to the boys?

A. John.

Q. Did he tell them what had gone on during this conversation?

A. Yes, sir.

Q. Did you remain at the plant or around the plant any longer that day?

A. We walked down to the corner and got some breakfast and then went back, and I set up a picket line and I stayed there until about four or four-thirty in the afternoon.

* * * * * * * *

[484] Cross Examination.

* * * * * * * *

[487] Q. Did you get any cards, Mr. Reilly, from people who were not drivers?

A. Yes, sir.

Q. Did you talk to any of those people yourself?

A. Yes, sir.

* * * * * * * *

[490] Q. Now, Mr. Reilly, as a matter of fact if you think back you will remember that you talked to these several bottling people on the day of the strike rather than the day after the strike.

A. I could be wrong.

Q. As a matter of fact they joined the strike right after lunch.

A. Was it the same day?

Q. Yes.

A. I thought they worked one day.

Q. Didn't they join in the picketing?

A. Some of them did.

[505] Q. When was this conversation with Mr. Tobin? Tell me about that.

A. At the office, about a week after the strike started.

Q. At the office, about a week after the strike started?

A. Approximately.

Q. What happened then?

A. Mr. Freeman and Mr. Shannon had asked—not Shannon, Croon—had asked Mr. Tobin if he would consider putting them back to work until this thing was settled by the NLRB, and he told them at that time no, he had hired drivers, and had all he needed.

Q. What day was that? Was that after the trucks had started rolling?

A. I don't remember the day.

[506] Q. Do you remember when the trucks started rolling again?

A. I think on Monday of the following week.

Q. Monday of the following week?

A. That's right.

Q. The trucks were already rolling then, weren't they?

A. On Monday; yes, I think so.

Q. Didn't the trucks start in on Monday?

A. I am pretty sure.

Q. And that was after the trucks had started rolling?

A. That's right.

Q. It was you and Mr. Shannon and Mr. Croon—there was nobody else but the three of you? I mean Mr. Freeman and Mr. Croon.

A. I think Mr. Shannon was there too.

Q. You think Mr. Shannon was there too?

A. Yes.

Q. Was Mr. Klein there?

A. No.

Q. Mr. Klein was not there?

A. No.

Q. He never was at any of these meetings?

A. I never went in the office with Klein at any time.

Q. And the four of you went in to Mr. Tobin's office?

A. That's right.

Q. Was anybody else there besides Mr. Tobin?

[507] A. There was a gentleman in there—a bookkeeper or something—but he did not join in the conversation.

Q. And they said to Mr. Tobin they wanted the company to put them back, pending a decision of the NLRB?

A. That's right.

Q. And Mr. Tobin said he had already hired men to take their place?

A. That's right.

* * * * * * * *

[512] Q. When was that said?

A. That was said the morning of the strike.

Q. The morning of the strike?

A. That's right.

* * * * * * * *

[513] Q. Tell me exactly what you can remember about it, and don't leave out anything that you remember.

A. Mr. Lunin asked Mr. Tobin—well, he first told him that the boys were out on the street, and they had voted not to [514] go back to work until Mr. Tobin had either agreed to recognize the union or waited for the NLRB to step in and render a decision.

Q. Go on.

A. At that time Mr. Tobin stated that regardless of who rendered any decision, he was not going to recognize any union; he didn't believe in a union in his line of business, although he did believe in unions in other crafts.

Q. Did he say anything about not believing that you had organized the people?

A. He stated that he didn't believe we had his people organized, and at that time John asked him if he could prove it, would he recognize us as their bargaining agent, and to that he said no.

Q. He said no?

A. That's right.

Q. All right. Now, what did he say about it not making any difference what the NLRB or anybody else said, that he wasn't going to recognize the union?

A. That's what he said.

Q. When did he say that?

A. Well, he didn't say it in that way.

Q. What did he say about that?

A. He said, "I don't care who you've got organized, or how many you've got organized, I am definitely not going to [515] recognize any union because it don't belong in my line of business."

Q. He said, "I am definitely not going to recognize any union because it don't belong in my line of business"?

A. That's right.

Q. And he said he was not going to recognize the union?

A. That's right.

Q. What was said about waiting for the NLRB?

A. John asked him.

Q. Asked him what?

A. If he would put the men back to work and wait for the NLRB to step into the picture, and when they rendered a decision, would they abide by it? He said he didn't care about anything the NLRB did or anybody else did, he wasn't going to recognize any union.

* * * * * * * *

[521] Mr. Constangy:

Mr. Examiner, I would like to renew my request for the admission of Respondent's Exhibits 1 and 2 in evidence.

* * * * * * * *

[522] Mr. Pate:
I have no objection to them.

Trial Examiner Hunt:
They are received in evidence.

(The documents heretofore marked Respondent's Exhibits Nos. 1 and 2 for idntification received in evidence.)

* * * * * * * *

[523] Mr. Pate:
Mr. Examiner, I will ask that the reporter mark as General Counsel's Exhibit 18 for identification, a photostatic copy of the Respondent's pay roll for the week ending August 18, 1948.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 18 for identification.)

As General Counsel's Exhibit 19 for identification, a photostatic copy of the Respondent's pay roll for the week ending August 25, 1948.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 19 for identification.)

As General Counsel's Exhibit 20 for identification, a photostatic copy of the Respondent's pay roll for the week ending September 1, 1948.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 20 for identification.)

As General Counsel's Exhibit 21 for identification, I will ask the reporter to mark a photostatic copy of the Respondent's pay roll for the week ending September 8, 1949.

[524] (Thereupon the document above referred to was marked General Counsel's Exhibit No. 21 for identification.)

Mr. Examiner, we are going to enter into a stipulation in respect to these pay rolls, and Mr. Constangy will state the stipulation for the record.

Trial Examiner Hunt:
All right. Do you want to offer the exhibits in evidence?

Mr. Constangy:
We have no objection to their admission.

Mr. Pate:
I will offer in evidence, General Counsel's Exhibits Nos. 18, 19, 20, and 21 for identification.

Trial Examiner Hunt:
They are received.

(The documents heertofore marked General Counsel's Exhibits Nos. 18, 19, 20, and 21 for identification, were received in evidence.)

Mr. Constangy:

It is proposed to be stipulated first, that wherever the last name which appears on these exhibits corresponds with the last name that appears on the complaint, even though initials vary or first names vary, we are talking about the same person.

Trial Examiner Hunt:

All right.

* * * * * * * * *

[525] It is proposed to be stipulated that as against the pay roll of August 18, 1948, General Counsel's Exhibit 18, the following men were driver-salesmen: Croon, Yost—

Trial Examiner Hunt:

Not too fast, please.

Mr. Constangy:

Croon, Yost, Wood, Miley, MacCubbin, Hetherington, Nelson, Shannon, Klein, Freeman, and Walls. That Mr. Chapman and Mr. Carnifax were route supervisors; that Mr. Dismukes was the sales manager; that Mr. Lutz was the advertising manager; that Mr. Prescott was the mechanic.

* * * * * * * * *

[526] For the week of August 25, General Counsel's Exhibit No. 19, driver-salesmen:

* * * * * * * * *

Mr. Constangy:

Driver-salesmen: Walls, Croon, Yost, Wood, Miley, MacCubbin, Hetherington, Nelson Shannon, Klein, Freeman, and Voight. Loader: Wyche.

* * * * * * * * *

[527] General Counsel's Exhibit No. 20, pay roll week of September 1: Walls, Croon, Voight, Yost, Wood, MacCubbin, Nelson, Shannon, Klein, Freeman—

Trial Examiner Hunt:

That's Freeman, isn't it? It is misspelled Friedman, I think.

Mr. Constangy:

On this particular pay roll it is misspelled Friedman.

Trial Examiner Hunt:

But it is the same person?

Mr. Constangy:

Yes, sir. We are talking about Mr. Freeman, the man who testified here yesterday. It is just misspelled here.

Trial Examiner Hunt:

All right.

Mr. Constangy:

The ones I just named were all driver-salesmen. L. Case, Studley, and Nesta, trainees. Chapman and Carnifax, route supervisors. Dismukes, sales manager. Lutz, [528] advertising. Prescott, mechanic. Brown, refrigerator man.

* * * * * * * * *

General Counsel Exhibit No. 21, pay roll of September 8, 1948: Walls, Croon, Voight, Yost, Wood, MacCubbin, Nelson, Shannon, Klein, and Freeman, driver-salesmen. Fisher and Case, trainees. Chapman and Carnifax, route supervisors. Dismukes, sales manager. Prescott, mechanic. Brown, refrigerator man. Barrick, office manager. Seneker and Hokin, office employees. Cohen, plant manager. Mack, Treacy, Bobbe, Tripp, Newman, and Christos, plant employees. Nesta, trainee.

Mr. Pate:
Driver-salesman trainee?

Mr. Constangy:
Driver-salesman trainee, that's right.

* * * * * * * *

The proposed stipulation is that Mr. Tobin, under oath, will testify as to those facts, from the pay roll. That is what we stipulate, that Mr. Tobin would so testify. It is in lieu of testimony on this subject by Mr. Tobin.

[529] Trial Examiner Hunt:
All right.

* * * * * * * *

[576] WILLIAM J. TREACY a witness called by and on behalf of the Company, being first [577] duly sworn, was examined and testified as follows:

Trial Examiner Hunt:
Be seated, and give your full name and address.

The Witness:

William J. Treacy, T-r-e-a-c-y, 2501 North West 58th Street.

Trial Examiner Hunt:

You will have to keep your voice up a little bit.

The Witness:

Yes, sir.

Direct Examination.

(By Mr. Constangy):

Q. Are you employed by the Seven Up Bottling Company?

A. That's right.

Q. How long have you worked there?

A. About three years.

Q. Were you working there in September of 1948?

A. Yes, sir.

Q. Do you remember what was your job, Mr. Treacy?

A. Running the tow motor.

Q. Speak up.

A. Running the tow motor.

Q. What does "running the tow motor" mean?

A. Hydraulic lift.

Q. Hydraulic lift?

A. Yes.

Q. Does it have wheels on it?

[578] A. Yes.

Q. Is it a vehicle?

A. That's right.

Q. Does it move around the plant?

A. Yes.

Q. Is it motor driven?

A. That's right.

Q. What do you do with it?

A. Carry the Seven-Up outside to the trucks and carry the empties back in.

Q. Do you have any other duties, Mr. Treacy?

A. I do anything that comes up.

Q. Have you any function in connection with loading or unloading trucks?

A. No, I just bring the stuff out there.

Q. What do you mean, "out there"? Do you mean out to the platform?

A. Out on the pallet. I bring it out.

* * * * * * * *

[583] Cross Examination.

(By Mr. Pate):

Q. Did anybody ever ask you to join the union at any time before the day of the strike?

A. No, sir.

Q. That is the first time anybody had said anything about joining the union to you?

A. That's right.

Q. You knew before that time that some of the drivers or some of the employees had joined the union?

A. I heard the drivers talking about it out in the back.

Q. You heard the drivers talking about the union?

A. That's right.

Q. And you knew before that time that the drivers were in the union?

A. I don't know whether they were in the union.

They were talking about it. They didn't say whether they were in it or not. They were talking about joining it.

[584] Q. Over what period of time had that been taking place?

A. Only about three or four days before the strike was the first time I heard about it.

Q. Did you hear any talk about joining the union among the plant employees?

A. No.

Q. All the talk was among the drivers?

A. Yes, sir.

* * * * * * * *

[592] CHARLES H. CARNIFAX a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Trial Examiner Hunt:

Be seated, and give us your full name and address.

The Witness:

Charles H. Carnifax. I live at 1910 North West 52nd Street.

Direct Examination.

(By Mr. Constangy):

Q. Are you employed by the Seven Up Bottling Company?

A. Yes, sir.

Q. How long have you been employed by them, Mr. Constangy?

A. It will be thirteen years this coming July.

Q. What is your position with them?

[593] A. At present I am route supervisor.

Q. How long have you held that position?

A. Approximately ten years, with the exception of a little bit during the year I was inside the plant.

Q. Were you a plant supervisor?

A. Yes, at that time.

Q. Mr. Carnifax, were you employed by the Seven Up Bottling Company in your present position during July, August and September of 1948?

A. I was.

* * * * * * * *

[596] Q. Now, Mr. Carnifax, had you ever had any other discussion, prior to that, with Mr. Freeman about a fifty dollar guarantee, a bonus, or unions?

A. Not in a direct way, no.

Q. How did you hear or know that he was interested in or might be interested in a strike?

A. That was more or less common knowledge there in the last week or so. There wasn't a whole lot of strike talk, except "If this doesn't happen, we're going to strike". I had heard one of the men say that as I walked by them.

Q. If what doesn't happen, Mr. Carnifax?

A. If they didn't get the demands that they wanted. The principal one was the fifty dollar minimum guarantee.

Q. Had anybody ever said anything to you about a fifty dollar minimum guarantee?

A. Not any more than—You mean for me to try to get it for them?

Q. Yes.

[597] A. No. They knew I had no authority to give it to them.

Q. Had you heard at any time or did you have any reason to think that the men were interested in that? Had there been any discussin of a fifty dollar guarantee, or some loss of pay?

A. I knew that that was one of the principal things that they wanted.

Q. Was there any special reason for that to be an active demand of the men at that time? Did you change your sysem in any way?

A. We had put on two more route salesmen—Correction. We had put on two more routes in order to try and better our service, and in putting on the routes right there in the middle of the summer, some of the commissions had gone below fifty dollars.

Q. Were any of the men dissatisfied as a result of that?

A. That is right. The men who went below the fifty-dollar mark were dissatisfied with the small take-home pay.

Q. Was there any discussion in your presence of that dissatisfaction?

A. Well, Nat Freeman had gone below fifty dollars one time, and I remember he told me, he said, "I'm ashamed to take my pay envelope home and give it to my wife." I remember that particular remark.

* * * * * * * *

[604] Q. Let me ask you this, Mr. Carnifax: Did any of the drivers who went on strike come back to work on Morning morning?

A. Yes, sir, there was one man who came back on Monday morning.

Q. Who?
A. Cliff Voight.
Q. Cliff Voight?
A. That's right.
Q. Were there any drivers who didn't strike?
A. There was one who didn't and one other driver who was on vacation.
Q. Did they come back on Monday morning?
A. They came back on Monday morning.
[605] Q. Who were they?
A. A fellow named Nelson and a fellow named Wood.
Q. So on Monday morning, of the old drivers, you had Nelson, Wood, and Voight?
A. That's right.
Q. And the rest of them were new men?
A. That's right.
Q. Hired since the strike?
A. Yes.
Q. Is that right?
A. That's right.

* * * * * * * *

[618] CHARLES MASON DISMUKES a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Trial Examiner Hunt:
Be seated, and give us your full name and address.

The Witness:
Charles Mason Dismukes, 797 North West 74th Street, Miami, Florida.

Direct Examination.

(By Mr. Constangy):

Q. Mr. Dismukes, will you state your position with the Seven Up Bottling Company, and how long you have held that position, please, sir?

A. Mr. Constangy, my position with the Seven Up Bottling Company is that of sales manager. I have held the position of sales manager since 1947.

• • • • • • • •

[619] Q. Now, Mr. Dismukes, in the course of that period of August and September of 1948, do you remember a strike which occurred on the Tuesday morning following Labor Day?

A. Yes, there was a strike.

Q. Do you remember what happened on the morning of the strike, insofar as any conversations you might have had with anyone in connection with it were concerned?

[620] A. Yes, on the morning of September 7, 1948, I arrived at the Seven Up Bottling Company plant, and walked back to the rear of the plant. After I had been there for about five or ten minutes, Mr. Chapman said there was someone up there to see me, so I walked up to the front of the plant, and there were Mr. Lunin and Mr. Reilly. They spoke to me and said, "We suppose you know what we're here for," and I said, "I think I do," and without any further ado, I said to them, "I will have to call Mr. Tobin."

Q. Which Mr. Tobin are you talking about?

A. This is Mr. A. J. Tobin.

Q. Mr. A. J. Tobin?

A. I'm sorry. Mr. Sherman Tobin.

Q. Mr. Sherman Tobin?

A. That's right. So I stepped to the rear of the plant and phoned Mr. Tobin at his home, and he came down immediately to the plant.

Q. How long is immediately?

A. There must have been a lapse of twenty-five minutes or so.

* * * * * * * *

[623] Q. What took place in that conversation, Mr. Dismukes? Tell me who said what, and what reply was made by anybody else.

A. Mr. Lunin asked Mr. Tobin to recognize his union, and Mr. Tobin stated—rather Mr. Lunin said that he had a majority of his men out, and Mr. Tobin said he didn't believe he had a majority, and anyway he had no authority to recognize any union, as his father was out of town. That's about all.

Q. What did Mr. Lunin say?

A. I believe Mr. Lunin had made some statement that—well, he made some recommendations that his union was easy to get along with, and he gave him a list of recommendations of places that were organized in the Miami area.

Q. Do you remember—

A. That's about all I remember him saying. After that it seemed to break up, and he left.

* * * * * * * *

[625] Q. What did you say?

A. I stated in the course of the conversation that I would like to tell Mr. Lunin that he had in his crowd that were out on the street some driver-salesmen

trainees. I just wanted to pass that on to them. That's about all I said.

[627] Q. Did you ever make a statement to Mr. Lunin that a union wasn't for driver-salesmen, but for crafts like electricians, bricklayers, carpenters, and that sort of thing?

A. I made a statement to Mr. Lunin the following week.

Q. The following week?

A. Following the strike. The next week.

Q. Yes?

A. That would be sometime around the time of September 14 or 15.

Q. Where was this?

A. In Mr. Tobin's office.

[632] Q. Do you remember the week of the strike—what you did on Thursday and Friday of that week?

A. Well Thursday, Friday and Saturday I was at the office at 1665 North Miami Avenue, recruiting men for the positions of salesmen of the Seven Up Bottling Company.

[634] Q. Mr. Dismukes, there are two or three job classifications about which I would like to have you tell us briefly what the men in those classifications do, simply to round out this record. You have a classification of mechanic.

A. That is right.

Q. What is his job, briefly?

A. We have two mechanics: We have a truck mechanic.

Q. Yes?

A. His job is to maintain and repair the fleet—keeping in repair the sales fleet, the advertising trucks and the plant trucks. These trucks are used in the sale of Seven-Up.

Q. When you say the fleet, Mr. Dismukes, do you mean the [635] trucks driven by the driver-salesmen?

A. Well, we have a fleet of twenty-five or twenty-six trucks.

Q. Are those the trucks that the driver-salesmen drive?

A. That is correct.

* * * * * * * *

Q. Now, Mr. Dismukes, what does the advertising man do?

A. The advertising man is responsible for the placing of outside signs—that is, metal signs. He goes out and works the route like a salesman—goes from dealer to dealer placing his signs.

* * * * * * * *

[637] Q. What does the refrigeration man do?

A. The refrigeration man is a mechanic. He maintains and services the Seven Up cooling equipment. This consists of coolers and vendors.

Q. Does he have a route? Where does he work?

A. No, he works in all territories in the franchise. What I mean by that is that we have twelve routes.

Q. Does he work in the customer's place of business or in your place of business?

A. Both. He works in the dealer's place of business and in the plant.

* * * * * * * *

[644] Q. What does the refrigerator man do?

A. The refrigerator mechanic is responsible for the servicing and maintenance of Seven-Up coolers and vendors.

Q. When you refer to "vendors" you are talking about a machine, not a salesman?

A. That is correct. It is a nickel vending machine.

Q. Where are they placed?

A. In dealer outlets, service stations.

Q. Anywhere else?

A. Super markets.

* * * * * * * *

[645] Q. Now, Mr. Dismukes, we have had some reference here in this hearing to the term "plant help". What does that consist of, sir?

A. Plant help consists of men who are operating the plant machinery, loading trucks, merchandise stackers, plant supervisors.

Q. Do you have any cleaners in there?

A. Clean-up men; syrup men. All of those are plant help.

Q. Who is in charge of the plant men, over-all?

A. The plant foreman.

Q. Does he supervise all of the plant help? Well, tell us what is the plant foreman's function.

A. The plant foreman is a mechanic supervisor. He has charge of maintaining and servicing the plant machinery, and he supervises the plant help.

Q. Does that include all the plant help, or is he limited just to the bottling help?

A. That is all the plant help.

Q. To whom does he report, Mr. Dismukes?

A. He reports to me.

Q. Is he located in the plant?

A. In the plant.

* * * * * * * * *

[647] Q. What do the loaders and unloaders do, as distinguished from the bottling people?

A. Loaders and unloaders may be clean-up men when there is nothing else to do in the back of the plant, or they may be operating a piece of machinery there—they may be running a piece of machinery.

Q. Do you alternate these various classifications?

A. That's right.

Q. Of plant help around?

A. That's right.

Q. They sometimes run the bottling machinery?

A. That's right. A man may be inspecting, or he may be moved to the accumulating table, packing cases, or he may be moved from that job to feeding a soaker, or a sterilizer, as you would know it. You have to be versatile.

* * * * * * * * *

[648] Q. Now, Mr. Dismukes, what are the hours of work of your employees?

A. Seven or eight hours a day.

Q. Seven or eight hours a day?

A. Seven or eight hours a day, that's right, as the case may be.

* * * * * * * *

[658] Cross Examination.

* * * * * * * *

[659] Q. Did you ever know that Mr. Lunin called at the office or made any effort to get in touch with Mr. Tobin?

A. Mr. Tobin told me he had received a letter from the union.

Q. Is that all that Mr. Tobin said about the union trying to get in touch with him in any way?

A. That's all he said to me.

Q. When did he tell you that he received a letter?

A. I don't recall.

Q. What did he say he was going to do about it?

A. He didn't say he was going to do anything about it.

Q. Did he ask you what you thought he should do about it?

A. No, sir.

Q. Was that his entire statement?

A. As far as I can remember.

Q. Did he say whether or not he was going to recognize the union at that time?

A. No, he didn't say.

Q. What did he say about the letter that he said he had received?

A. As far as I remember, he just stated that he had received a letter. I don't remember any comments.

Q. Did he show you the letter?

[660] A. No, I didn't see the letter.

* * * * * * * * *

[666] Q. That statement was made in the same conversation between Mr. Tobin and Mr. Lunin that you have already talked about, is that right?

A. That's right. The morning of September 7, I believe it was.

Q. At that time all the drivers except one who had reported for work and one who was out of town, were out in front of the plant on strike, is that correct?

A. At the time of that conversation I think those drivers were in front of the plant, inside, at the time of this conversation of September 7. I believe that's correct.

Q. They had not reported for work?

A. Oh, yes, they had reported to work earlier—earlier than the conversation.

Q. You mean the drivers did report to work on September 7, 1948?

A. Reporting for work, I suppose, is what you'd say this was. When I arrived at the plant they were all in the back yard, and as far as I knew they looked like they were ready to [667] get on the trucks and go to work.

Q. Did they actually do any work that day?

A. No, they didn't do any work. They were just there. Actually before a driver does any work he is out at his dealer's place of business, or you may say he is working when he gets his truck and starts driving. But they did not get in the trucks, no.

Q. After the conversation they left the place where they had been in back of the plant?

A. That's right, and Mr. Lunin moved them across the street from the plant.

Q. At that time you yourself did not have any doubt about the majority, did you?

A. Personally, I had a doubt about the majority, yes.

Q. You did not doubt that there were a majority of them across the street there though, did you, picketing?

A. They had a majority of the driver-salesmen across the street, yes.

Q. Well, you had no doubt about the majority of the driver-salesmen, did you?

A. That's right, I had no doubt about that.

* * * * * * * * *

[670] Q. You interviewed the applicants who were employed to replace the strikers, did you not?

A. That is right.

Q. You started doing that about September 10, 1948?

A. September 10? I believe I started on—let's see, the 10th would be a Friday, wouldn't it? I started Thursday.

Q. Thursday would have been the 9th.

A. Yes.

Q. You started on Thursday?

A. Thursday, I believe, or possibly Wednesday, I don't recall. It may have been Thursday morning. Thursday, Friday, and Saturday of that week were spent in interviewing new men for the routes.

* * * * * * * * *

[676] CLIFFORD HOLMES VOIGHT a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Trial Examiner Hunt:

Be seated, and give us your full [677] name and address.

The Witness:

Clifford Holmes Voight, 1821 North West Fifth Avenue, Miami.

Trial Examiner Hunt:

How do you spell that?

The Witness:

V-o-i-g-h-t.

Direct Examination.

(By Mr. Constangy):

Q. Mr. Voight, are you employed by the Seven Up Bottling Company?

A. Yes, sir.

Q. Were you employed by them in August and September of 1948?

A. Yes, sir.

Q. Do you remember when you first went to work for them?

A. I am not quite sure of the date, but I imagine it was somewhere about the second or third week of August.

Q. Mr. Voight, do you remember whether or not in August of 1948 you were a driver-salesman?

A. Somewhere near the end of August or the first of September.

* * * * * * * *

[679] Q. Now, Mr. Voight, did you participate in a strike which took place beginning the day after Labor Day, 1948?

A. Yes, sir.

Q. Did you picket in connection with that strike?

A. Yes, sir.

Q. How much did you picket?

A. I think about twice. Two hours, I'd say.

Q. Where did you picket, at the plant or office?

A. At the plant.

Q. At the plant?

A. Yes.

Q. Now, Mr. Voight, do you remember the Friday of the strike or during the strike, the day you got paid?

A. Yes, sir.

Q. Will you tell us what happened in connection with your getting paid that day? What did you do about getting paid? Tell us about that.

[680] A. I went down to Mr. Tobin's office, and Mr. Sherman Tobin was there. The object wasn't to go down to get paid. The strike—I just couldn't see it. I mean it wasn't, from my point—well, I didn't think it was the right thing. After thinking it over I went down to tell Mr. Tobin that I was going to quit in order to get out of both of them.

Q. When you say you told Mr. Tobin you were going to quit in order to get out of both of them, did you mean quit the employment of Seven-Up or quit the strike?

A. That's right, sir.

Q. Which did you mean?

A. To quit the employment of Seven-Up and then I figured that would free me of being with the company and of being with the union.

Q. And the strike?

A. Yes, sir.

Q. What happened when you went down there?

A. Mr. Tobin told me that it wasn't necessary for me to quit. He told me that I could have my job, if I wanted it, and he said he would like to see me come back.

Q. What did you say to Mr. Tobin?

A. I said, "If you feel that way about it, I'd be willing to come back".

Q. What was said then? Did he tell you anything about when to come back?

[681] A. He happened to ask me to be at the office that evening. That's what he asked me.

Q. What day of the week was that, Mr. Voight?

A. That was Friday.

Q. He asked you to be at the office that evening?

A. Yes, sir.

Q. Did you come that evening?

A. I did.

Q. What did you do that evening?

A. I don't know just who was in my car, but there were three or four of us in my car, and we went to Mr. Tobin's home on the beach.

Q. What did you do at Mr. Tobin's home on the beach?

A. I saw the Seven-Up training film.

Trial Examiner Hunt:

That was Mr. A. J. Tobin's home?

The Witness:

That's right, sir.

Trial Examiner Hunt:

At what time?

The Witness:

Late in the evening, around seven or a quarter after.

(By Mr. Constangy):

Q. You say about seven or a quarter after seven?

A. Yes, sir.

Q. You say you saw a Seven-Up training film at his home?

A. That's right.

Q. Was anybody else present there besides you and Mr. [682] Sherman Tobin?

A. Yes, sir. There was a group of men there. Mr. Dismukes, Mr. Tobin, Mr. Carnifax, Mr. Chapman.

Q. Were any people there that you had not seen before?

A. Yes, sir.

Q. Can you estimate how many?

A. Well, I'd say about eight—possibly ten.

Q. Eight or ten?

A. Yes, sir.

Q. Did you do anything the next day in connection with the Seven Up Bottling Company?

A. No, sir.

Q. Did you go to any further sessions at Mr. A. J. Tobin's home?

A. The following evening, Saturday evening.

Q. On Saturday evening?

A. Yes, sir.

Q. You did not work on Saturday?

A. No.

Q. You went to Mr. Tobin's home again on Saturday evening, and what happened then?

A. It was another sales training film that I saw.

Q. Another training film?

A. Yes, sir.

Q. Was there any discussion by anybody about sales, or [683] anything else?

A. Well, sales training films naturally have a discussion following, explaining the film more thoroughly.

Q. Were there any other people at that meeting besides you?

A. It was the same group, sir.

Q. Did you go to any further training sessions?

A. The one on Saturday night, I believe, was the last one.

Q. Did you resume your route?

A. Yes, sir.

Q. When did you resume your route?

A. The following morning. Pardon me. The following Monday.

Q. The following Monday?

A. Yes, sir.

* * * * * * * * *

Cross Examination.

(By Mr. Pate):

Q. Mr. Voight, when you went in to see Mr. Sherman Tobin—

[684] A. Yes, sir.

Q. —during the strike, what did you say to him?

A. I told Mr. Tobin that I didn't think that the union was doing the right thing, and that I wanted to quit my job. I said, "That will relieve me of the union, and I won't be under any obligation to either of them".

Q. After you made that statement, did he tell you that it wouldn't be necessary for you to quit—that you could come back and go to work?

A. Yes, sir.

Q. Before the strike started, you had attended union meetings, hadn't you?

A. Yes, sir, two of them.

Q. Approximately when were those meetings held?

A. The Sunday before Labor Day and the Tuesday morning of the strike.

Q. Those were the only meetings that you attended?

A. That's right, sir.

Q. The other driver-salesmen attended those meetings too, did they not?

A. That's right.

Q. All of them?

A. I believe all were there. I couldn't rightfully say, sir. I imagine they were all there.

Q. Did they take a strike vote at one of those meetings?

[685] A. I think at the meeting they had on Sunday they had their strike vote.

Q. Was that taken by a written ballot?

A. That I don't recall, whether it was written or by hand.

Q. You admit they did vote to strike?

A. I beg your pardon?

Trial Examiner Hunt:

What was the answer of the witness?

Mr. Constangy:

Whether written or by hand—by show of hands, I assume.

(By Mr. Pate):

Q. Do you remember that the vote was to go on strike?

A. That's right.

Mr. Constangy:

Speak up a little more, please.

The Witness:

Sorry.

Q. And until the Sunday before the strike started, you had attended no union meetings?

A. No, sir.

Q. You did picket during the strike, you said, didn't you?

A. Yes, sir.

Q. Did all the other driver-salesmen picket too?

A. Yes, I believe everybody had their turn at it.

Q. Did that include everybody who had been working on the trucks just before the strike?

A. That's right.

[686] Q. I believe Mr. Nelson did not go on strike, is that correct?

A. That's right.

Q. And when you say "all", do you mean all except Mr. Nelson?

A. You are right, sir.

Q. You yourself voted in favor of going on strike, didn't you?

A. Yes, sir.

* * * * * * * *

[694] SHERMAN TOBIN

* * * * * * * *

[695] (By Mr. Constangy):

Q. Now, Mr. Tobin, will you briefly run through Respondent's Exhibit 5, and tell us the job titles of the people shown on that exhibit?

A. Driver-salesmen.

Q. I mean call the name and give the job title.

A. Palaske, driver-salesman.

Trial Examiner Hunt:

How do you spell that?

The Witness:

P-a-l-a-s-k-e. Chase, driver-salesman. Voight, driver-salesman. Legge, driver-salesman.

Trial Examiner Hunt:

Is that spelled L-e-g-g-e?

The Witness:

That is correct. Wood, driver-salesman. Thomas, driver-salesman. Perretti, driver-salesman. Caziarc, driver-salesman.

Trial Examiner Hunt:

That is spelled C-a-z-i-a-r-c?

The Witness:

That is correct. Nelson, driver-salesman. [696] Hancock, driver-salesman. Bell, driver-salesman. Daugherty, driver-salesman. Krug, driver-salesman. Connally, driver-salesman. Cutshaw, driver-salesman.

Chapman, route supervisor. Carniflax, route supervisor. Dismukes, sales manager. Prescott, automobile mechanic. Brown, refrigeration mechanic. Baruch, office manager. Seneker, office employee. Hokin, office employee. Cohen, plant foreman. Mack, plant employee. Treacy, plant employee. Bobbe, plant employee. Tripp, plant employee. Marshall, plant employee. Deverow, plant employee. Hanna, plant employee. Hewitt, plant employee. Ventgewall, plant employee. Wyche, plant employee.

(By Mr. Constangy):

Q. Mr. Tobin, were three of the men whose names you read off as driver-salesmen, actually driver-salesmen trainees?

A. Yes. Cutshaw was a trainee; Connally was a trainee, and I believe Krug was a trainee.

* * * * * * * *

[697] (By Mr. Constangy):

Q. These you are reading are people who were employed as of the time of the strike or prior to the strike?

A. Correct.

Q. The week in which the strike occurred?

A. That is right.

Q. All right.

A. Walls on Route No. 3. Croon to Route No. 4. Voight, Route No. 5. Yost, Route No. 6. Wood, Route No. 7. MacCubbin, Route No. 9. Nelson, Route No. 12. Shannon, Route No. 14. [698]. Klein, Route No. 16. Freeman, Route No. 17. Trainees: Fisher, Case, Studley, and Nesta.

Q. Were the trainees Studley and Nesta temporarily on routes at that time?

A. Studley and Nesta were temporarily on Routes No. 11—

Q. Which was on Route No. 11?

A. Nesta. And Studley was temporarily on Route No. 8.

* * * * * * * *

Q. All right, Mr. Tobin. Can you tell us whether or not Mr. A. J. Tobin or Mrs. Rebecca Tobin were in Miami in August or September of 1948?

A. No, they were not in Miami during those months.

Q. Do you remember when they left Miami.

A. They left Miami early in the month of August, and returned late in the month of September.

Q. Do you know where they went?

A. They went to New York. My father was under treatment for his health.

[699] Q. Mrs. Rebecca Tobin is your mother?

A. That's right.

Q. Did she accompany your father?

A. She was with father all the time.

Q. She was not in Miami from early August until late September of 1948?

A. No, she was not.

* * * * * * * *

[702] Q. What was the substance of that phone call, Mr. Tobin?

A. Mr. Lunin asked me if I had received a letter from him. I stated that I did. He said he would like

to see me at my office. I told him that I would be glad to see him any time. That was the extent of the conversation.

Q. Did he come to see you?

[703] A. I believe he came the next day to see me.

Q. Who was present when he came to see you the next day in any conversations you might have had with him?

A. I believe I was the only one at that time.

Q. You and Mr. Lunin?

A. That is right.

* * * * * * * *

[704] Q. I hand you General Counsel's Exhibit No. 4 (handing to witness). That is a copy of the registered letter you received?

A. Yes.

Q. Was that the next communication you received from Mr. Lunin after that?

A. That was the next time I heard from Mr. Lunin.

Q. Did you have any conversation with Mr. Lunin after that; Mr. Tobin?

A. I believe Mr. Lunin came in to see me in my office after that.

[705] Q. How long after receipt of the registered letter?

A. Within a day or so.

Q. Within a day or so after receipt of the registered letter?

A. That is right.

Q. When I said "after that" I was referring to after receipt of the registered letter.

A. Yes.

Q. Can you tell us what, if anything, transpired when Mr. Lunin came into your office on that occasion?

A. Mr. Lunin came in at that time and said that he had either 97 or 98 percent of my employees in the union.

* * * * * * * *

[706] Q. Tell us what transpired first on the morning of September 7.

A. The first thing I knew I received a call from Mr. Dismukes about seven o'clock in the morning.

Q. Where were you at that time?

A. I was at home, sleeping.

Q. What did Mr. Dismukes say?

A. Mr. Dismukes said that there was a Mr. Lunin waiting to see me. He told him he was from the union, and I knew who Mr. Lunin was. I told him I would be in town as soon as I could get dressed.

Q. Did you come to the plant directly?

A. Yes, I came directly to the plant.

Q. About what time did you get to the plant?

A. That was about a quarter to eight.

Q. About a quarter to eight?

A. That is right.

Q. Tell me what you did when you got to the plant.

A. I drove my car in the back gate and went in to see Mr. Dismukes.

Q. Did you see Mr. Lunin or any of the men in front of the [707] plant as you drove by?

A. There was a group of men waiting across the street in front of the plant.

Q. There was a group of men waiting across the street in front of the plant?

A. Yes.

Q. What happened when you went in to see Mr. Dismukes?

A. Mr. Dismukes said, "There are two gentlemen waiting to see you". I walked with Mr. Dismukes toward the middle of the plant, toward the front.

Q. Yes?

A. Mr. Lunin and Mr. Reilly came from the front door and met us halfway in the middle of the plant.

Q. Was anyone with Mr. Lunin or Mr. Reilly at that time?

A. No, there was not.

Q. What happened then, Mr. Tobin? Who started the conversation?

A. Mr. Lunin started the conversation.

Q. Mr. Lunin started the conversation?

A. Yes.

Q. What did he say?

A. He said, "I guess you see there are some men across the street". I said I did. He said, "I'd like to put them back to work if you will sign a—", well, sign something.

Q. A recognition agreement?

[708] A. A recognition agreement. That is correct.

Q. What did you say to that?

A. I said, "Mr. A. J. Tobin is still out of town, and I'd appreciate it if you could wait until Mr. A. J. Tobin comes back, because he would be the man you'd have to see. I have no authority to do anything about signing an agreement. I am not the president of the corporation".

Q. What did he say to that?

A. He didn't say much to that.

Q. What else was said then?

A. That was all, I believe. That was about all that transpired.

* * * * * * * *

[710] Q. When did the trucks start running?

A. The trucks were on the streets the Monday following the strike.

Q. The Monday following the strike?

A. That is right.

Q. That would be September 13?

A. The 13th is right.

* * * * * * * *

[711] Q. What transpired on the 16th, or this date when you had the next conversation with Mr. Lunin?

A. At that time Mr. Lunin came into my office and said that he would like to put the men back to work if I would sign an agreement, and if I would sign that agreement he would put the men back to work and he would call the whole thing off.

Q. Who was present at that time?

A. I believe Mr. Dismukes was with me in the office at that time.

* * * * * * * *

[712] Q. In this conversation that you have just related that transpired at your office, did you make any statement about salesmen should not be in a union—that only carpenters, bricklayers, electricians, and the like should be in a union?

A. No, I did not make any statement to that effect.

Q. Did you hear any such statement made in that conversation?

A. I believe Mr. Dismukes did say something to that effect.

* * * * * * * * *

[714] Mr. Constangy:

Mr. Examiner, yesterday the General Counsel suggested a stipulation that the conference with Miss Hopkins was on September 27, and I indicated that I would look it up. My record indicates that it also was on September 27, so we can so stipulate.

Trial Examiner Hunt:

All right.

(By Mr. Constangy):

Q. Had your father, Mr. A. J. Tobin, returned by then?

A. Yes, he had.

Q. And you had a conference on the 27th of September with Miss Hopkins?

A. Yes, that was when she came in.

Q. Where was that conference?

A. Miss Hopkins came to the office.

Q. To your office?

A. Yes.

Q. Who else was present?

A. Mr. Lunin. And I think my father was in and out of the office. I don't know if Mr. Reilly was in there or not.

* * * * * * * * *

[715] Q. All right. Now, Mr. Tobin, what took place in the conference with Miss Hopkins, as best you recollect?

A. When Miss Hopkins came into my office, I then called my lawyer, Mr. Bernstein, and notified him that Miss Hopkins was in Miami. Miss Hopkins stated that she wanted to get some information about interstate commerce from me at my office where the records were kept, and I told her I would be glad to give them to her. I then proceeded to give her that information, and I also made an appointment to meet Mr. Bernstein to [716] bring Miss Hopkins to Mr. Bernstein's office about noon of that day.

* * * * * * * *

Q. Now, Mr. Tobin, I will ask you whether or not during the period of the strike you had a conversation with a group consisting of Mr. Reilly, Mr. Klein, Mr. Shannon, and Mr. [717] Croon at your office?

A. No, I never did meet with them in a group.

Q. Did you meet with any of those men individually during the strike, and have any one of them or all of them asked you if the men couldn't go back until this thing is settled by the NLRB?

A. No, that never did happen.

* * * * * * * *

[726] Cross Examination.

* * * * * * * *

[729] Q. Did you feel that you had to be president of the business to hire new employees?

A. No, that was in the general nature of my duties.

Q. In order to discharge employees?

A. Yes, I could hire employees and discharge employees.

Q. And you did not have to be president of the business to do that?

A. No, that is correct.

Q. You also made purchases that were necessary for the operation of the business?

A. Yes, purchases were made through the office when they were necessary for the operation of the business.

Q. You did that while your father was away?

A. The office made the purchases, yes, and I was in charge of the office at that time.

Q. Did you at any time during your father's absence make any changes in the rates of pay of any employees?

A. No, I did not.

Q. No changes were made?

[730] Mr. Constangy:

Mr. Tobin, I can't hear you. Would you speak up a little?

The Witness:

No. I did not.

(By Mr. Pate):

Q. Did you consider that you had authority to do that?

A. In the normal course of business, yes.

* * * * * * * *

[734] Q. When the driver-salesmen failed to work that day, you had no doubt that the majority of them were in the union, did you?

A. I had seen no proof of it.

Q. Had you asked for any proof of it?

A. No proof was offered.

Q. Did you ask for any proof of it?

A. No proof was offered.

Q. That was not my question. I said, Did you ask for any proof of it?

A. No, I did not.

Q. When did you first hear that the employees were organizing?

A. When the first letter from Mr. Lunin came to my office.

Q. That was the first knowledge or information you had about the fact that they were organizing?

A. Yes.

Q. And you did discuss that with Mr. Dismukes?

A. Mr. Dismukes was shown the letter.

[735] Q. For what purpose did you show that to Mr. Dismukes?

A. Mr. Dismukes was in charge of the business along with me at that time.

Q. You and Mr. Dismukes were in charge of the business at that time?

A. In charge of keeping the business running, yes.

Q. That is the reason you spoke to Mr. Dismukes about it?

A. That's right.

Q. Were you seeking to get him to give advice on the question?

A. No, he wasn't asked for advice.

Q. Did you ask him anything when you showed it to him?

A. I just showed it to him and put it back on my desk.

Q. Did you give it to him to read?

A. He read the letter.

Q. In your presence?

A. In my presence.

Q. Did he make any comment about it?

A. No, he did not.

Q. Did you say anything further to him about it?

A. No, I did not.

Q. You didn't tell him whether you were going to recognize the union or not?

A. I didn't tell him anything about the letter.

Q. You merely handed it to him, let him read it, took it [736] back, and put it back on the desk?

A. I put it in my desk. That's the amount of importance I attached to it at that time.

Q. By that do you mean you didn't attach any importance to it at that time?

A. I said that the amount of importance that Mr. Dismukes' reading of the letter meant—letting Mr. Dismukes read the letter. I felt it was that important.

Q. You mean by that that you considered that it was not a matter of importance?

A. I did not say that.

Q. Or do you mean that it was something you considered sufficiently important to show to Mr. Dismukes?

A. That is correct.

* * * * * * * *

[738] Q. There never was any discussion between you and Mr. Lunin as to whether a unit of driver-

salesmen was appropriate, was there?

A. Mr. Lunin wanted to organize the employees of my plant. That was the only discussion of that question.

* * * * * * * *

[740] Q. Did you ask Mr. Lunin at the time he said he had signed up 97 or 98 per cent of your employees, whether he meant all employees or just driver-salesmen?

A. No, I did not ask him.

Q. Other than that statement there was actually no discussion between you and Mr. Lunin about the bargaining unit, was there?

A. I did not know what a bargaining unit was at that time.

Q. And consequently there was no discussion about it?

A. Correct.

Q. And you never did tell him what you thought the unit should be?

A. No.

Mr. Pate:

That is all.

Re-Direct Examination.

* * * * * * * *

[745] Q. Are you the general manger of the Seven-Up Bottling Company, Mr. Tobin?

A. I am not.

Q. You are not the general manager?

A. No, I don't believe so.

[746] Q. Have you ever been told you were the general manager?

A. I filled a lot of positions since I have been there.

Q. Did you ever sign an affidavit in 1949 that you were the general manager?

A. What date was this now?

Q. I hand you this (handing to witness).

A. Well, I guess since I work there, I have to have some title besides secretary-treasurer.

Q. Did you prepare this affidavit?

A. I believe Mr. Albert Bernstein prepared that.

Q. Did you dictate it?

A. Mr. Bernstein dictated it.

* * * * * * * * *

Trial Examiner Hunt:

What is the answer?

The Witness:

Yes, I signed it.

Trial Examiner Hunt:

What is the date of that, Mr. Constangy?

Mr. Constangy:

March 2, 1949.

Trial Examiner Hunt:

March 1949?

Mr. Constangy:

Yes.

[747] Trial Examiner Hunt:

All right.

(By Mr. Constangy):

Q. Were you general manager of the Seven Up Bottling Company around August or September 1948?

A. No, I was not.

Q. Whether you signed the affidavit or not, were you general manager at the time of this discussion?

A. No.

Q. Are you general manager now?

A. I am not.

Q. Have you ever been officially designated as its general manager?

A. I have not.

Q. Have the corporate records ever shown you were elected or designated by the board of directors as general manager?

A. No.

Q. Have you ever held that position?

A. No, I have not.

* * * * * * * *

[748] Mr. Bernstein:

As one of the counsel for the Seven Up Bottling Company of Miami, I should like to make a statement for the record.

* * * * * * * *

I had been employed by my client after the strike too place. I would say it was either on the afternoon of Labor Day, September 7, 1948, or the morning of the next day.

Trial Examiner Hunt:

Labor Day was September 6.

Mr. Bernstein:

I don't mean Labor Day, sir. I'm sorry. It was either the day of the strike, the day after Labor Day, which I understand to be September 7, 1948, or the day following. I don't remember exactly which it was, but the men had already walked out.

* * * * * * * *

[749] Miss Hopkins ultimately came to my office around the middle of the day, on September 28, 1948, with Mr. Sherman Tobin, and she very pleasantly and charmingly asked that we discuss our position, stating that she was just investigating, it was perfectly impartial, she was just trying to get the facts.

* * * * * * * *

[750] Then she said, "Will you consent to an election"? and I said, "If that case controls, [751] without even going much further or communicating with Mr. Tobin, Sr." —who was not there—"I would surely recommend it,

* * * * * * * *

[756] Mr. Bernstein:

I have just heard the witness, Sherman Tobin, examined concerning certain statements appearing in an affidavit, one statement being to the effect that he was the general manager of the Seven Up Bottling Company of Miami, Inc., and one statement being in

a letter referred to in the affidavit, that statement being that after the positions were permanently filled, one driver-salesman who had formerly worked for the company, asked for his position back but we were unable to give him his position back because this position had been permanently filled.

In connection with said affidavit, and the statement in the letter therein referred to, I should like to state for the record that I prepared in my office the affidavit and the letter. I prepared it from information which I obtained from various people working with the company, some over the phone and perhaps some by a personal interview. I understood the statements in there to be correct from the information which I had received.

* * * * * * * * *

[757] Mr. Constangy:

Mr. Examiner, it is proposed that the foregoing statement of Mr. Bernstein be stipulated as being evidence in this case as though it were sworn testimony.

Mr. Pate:

I agree to that stipulation.

Trial Examiner Hunt:

I think in explanation of a variance from the usual procedure and requirement of the swearing of witnesses, I should state it to be my understanding that there is a practice in Florida that counsel shall not testify in any case wherein they represent one of the litigants, except under unusual circumstances which

need not be detailed at this time; and that there is also a practice or a rule of evidence in this state that in lieu of testimony by counsel, counsel can, if all parties agree, make a statement for the record which shall be received as evidence, and I am following the evidence rule of this state in this instance.

I accept your stipulation.

* * * * * * * *

[758] Trial Examiner Hunt:

General Counsel's Exhibit 16, an undated application card of one Fisher, upon which I reserved ruling. I receive that exhibit in evidence.

(The document heretofore marked General Counsel's Exhibit 16 for identification was received in evidence.)

* * * * * * * *

[761] Mr. Pate:

I move that the pleadings be amended to conform to the proof in respect to dates, spelling of names, and other matters not of substance.

Mr. Constangy:

We have no objection.

Trial Examiner Hunt:

I grant it.

* * * * * * * *

G. C. EXHIBIT #2-A.

United States of America

National Labor Relations Board

Petition.

(Place an X in the box opposite the description which expresses the purpose of this Petition) for

☒ Certification of Representatives (Individual, group, organization) (RC)

☐ Certification of Representatives (Employer) (RM)

☐ Decertification of Representatives (RD)

☐ Authority for Bargaining Relative to Union Security (UA)

☐ Rescinding Authority for Union Security Previously Granted (UD)

Do Not Write In This Space

Case No. 10-RC-370

Date Filed 9-14-48

9 (f), (g), (h) cleared EF

Petitioner alleges that the following circumstances obtain and requests that the National Labor Relations Board proceed under its proper authority.

(Answer all of the following, using "none" if the situation warrants. Only an Employer Petitioner answers 10 and he does not answer 5(b), 12, 13, 14, or 15).

1. Name of employer Seven-Up Bottling Co.

(2) Address(es) of establishment(s) involved (Street) 1655 N. Miami Ave. (City) Miami (State) Florida

3. Nature of business Beverages

4. Description of the Unit involved

Included All Driver Salesmen and Plant Help

Excluded Foremen Supervisors and all Office and Clerical Help

5. (a) Number of employees in Unit 18

(b) Employees supporting this Petition: Number 18: Percentage 100%.

6. Name and affiliation of recognized or certified bargaining agent .....

7. Date of such recognition ..... or certification .....

8. Date on which Union Security authority was granted .....

9. Expiration date of current contract, if any .....

10. Names of parties who have claimed recognition as representatives. Give date of each claim. (Only Employer Petitioner answers this question)

..... Date .....

..... Date .....

11. Names and addresses of any other interested parties .....

12. (a) Has the Petitioner notified the employer of claim that a question concerning representation has arisen? Yes

(b) Has the employer failed to recognize Petitioner? Yes

13. (Paragraphs 13, 14, and 15 apply only if the Petition is filed by a labor organization). Petitioner has complied with Section 9(f)(A), 9(f)(B)(1), and 9(g) of the National Labor Relations Act as amended, as evidenced by letter of compliance issued by the Department of Labor and bearing code number 1233390. The financial data filed with the Secretary of Labor is for the fiscal year ending 1947. A certificate has been filed with the National Labor Relations Board in accordance with Section 9(f)(B)(2) stating the method employed by Petitioner in furnishing to all its members copies of the financial data required to be filed with the Secretary of Labor.

14. Each of the officers of the union has executed a non-communist affidavit as required by Section 9(h) of the Act.

15. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9(f), (g) and (h) of the Act.

Petitioner (State full name and affiliation, if any) International Brotherhood of Teamsters, Chauffeurs & Warehousemen, Local 390

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS & WAREHOUSEMEN, LOCAL 390.
(Signature of representative or person filing petition)
By JOHN J. LUNIN,
(John J. Lunin),
Sec-Treas., Bus. Mgr.
(Title, if any)

Address: (Street) 127 Northeast 1st Avenue
(City) Miami (State) Florida
(Telephone number) 3-4544

Subscribed and sworn to before me this 13 day of September, 1948 at Miami, Fla., as true to the best of deponent's knowledge, information and belief.

MARION P. PALMER,
(Seal) Notary Public, State of Florida at Large.

My commission expires September 27, 1950.

MARION P. PALMER,
Board Agent or Notary Public.

Petitioner should submit with this petition, for examination by Board Agents, such documentary evidence which it has in its possession in support of this petition, together with an alphabetical list of the names of persons on such evidence.

(Submit Original and Four Copies of this Petition)

G. C. EXHIBIT #2-B.

United States of America

National Labor Relations Board

Amended Petition.

(Place an X in the box opposite the description which expresses the purpose of this Petition) for

☒ Certification of Representatives (Individual, group, organization) (RC)

☐ Certification of Representatives (Employer) (RM)

☐ Decertification of Representatives (RD)

☐ Authority for Bargaining Relative to Union Security (UA)

☐ Rescinding Authority for Union Security Previously Granted (UD)

Do Not Write In This Space

Case No. 10-RC-370

Date Filed 10-7-48

9 (f), (g), (h) cleared .....

Petitioner alleges that the following circumstances obtain and requests that the National Labor Relations Board proceed under its proper authority.

(Answer all of the following, using "none" if the situation warrants. Only an Employer Petitioner answers 10 and he does not answer 5(b), 12, 13, 14, or 15).

1. Name of employer Seven-Up Bottling Co. of Miami, Inc.

(2) Address(es) of establishment(s) involved (Street) 1655 N. Miami Ave. (City) Miami (State) Florida

3. Nature of business .....

4. Description of the Unit involved

Included All Driver-Salesmen

Excluded Casual labor, guards, office, clerical and professional employees, foremen and all other plant supervisors and employees and outside supervisors as defined in the act.

5. (a) Number of employees in Unit ..

(b) Employees supporting this Petition: Number ..: Percentage .....

6. Name and affiliation of recognized or certified bargaining agent .....

7. Date of such recognition .....,
or certification .....

8. Date on which Union Security authority was granted .....

9. Expiration date of current contract, if any .....

10. Names of parties who have claimed recognition as representatives. Give date of each claim. (Only Employer Petitioner answers this question)

..... Date .....

..... Date .....

11. Names and addresses of any other interested parties .....

12. (a) Has the Petitioner notified the employer of claim that a question concerning representation has arisen? ....

(b) Has the employer failed to recognize Petitioner? ....

13. (Paragraphs 13, 14, and 15 apply only if the Petition is filed by a labor organization) Petitioner has complied with Section 9(f)(A), 9(f)(B)(1), and

9(g) of the National Labor Relations Act as amended, as evidenced by letter of compliance issued by the Department of Labor and bearing code number ..... The financial data filed with the Secretary of Labor is for the fiscal year ending .... A certificate has been filed with the National Labor Relations Board in accordance with Section 9(f)(B)(2) stating the method employed by Petitioner in furnishing to all its members copies of the financial data required to be filed with the Secretary of Labor.

14. Each of the officers of the union has executed a non-communist affidavit as required by Section 9(h) of the Act.

15. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9(f), (g) and (h) of the Act.

Petitioner (State full name and affiliation, if any) International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL., Local 390

By JOHN LUNIN,
(Signature of representative or person filing petition)
Secty.-Treas., Bus. Manager
(Title, if any)

Address: (Street) 127 N. E. 1st Ave.
(City) Miami (State) Florida
(Telephone number) 3-4544

Subscribed and sworn to before me this 6th day of Oct., 1948, at 826 Washington Ave., Miami Beach, Fla. as true to the best of deponent's knowledge, information and belief.

BERNARD S. PERRIER,
Notary Public, State of Florida
at large.

(Seal)

My commission expires October 25, 1949.

*Petitioner should submit with this petition, for examination by Board Agents, such documentary evidence which it has in its possession in support of this petition, together with an alphabetical list of the names of persons on such evidence.

(Submit Original and Four Copies of this Petition)

G. C. EXHIBIT #3.

Copy.

August 19, 1948

Mr. Tobin
7 Up Bottling Co.
1655 N. Miami Ave.
Miami, Florida

Dear Sir:

A majority of your Driver Salesmen have chosen this Local as their bargaining representative.

We will be happy to meet with you at your convenience for the purpose of discussing the procedure to follow.

I was in to see you personally and left my card for an appointment at your earliest convenience.

Very truly yours
JOHN J. LUNIN
Secretary, Treasurer
Business Manager

JJL/jb

G. C. EXHIBIT #4.

Via Registered Mail,
Return Receipt Requested

August 30th, 1948

Mr. Tobin, Jr.
7-Up Bottling Co.
North Miami Ave. & 17th St.
Miami, Florida

Dear Sir:

This letter will serve as our notice and desire of a meeting with you again pertaining to our negotiations for the drivers. We have met again with the drivers and received their authorization to proceed as their bargaining agent. Your failure to meet with me will serve as notice of non-cooperation on the part of the 7-Up Bottling Co.

I sincerely hope you will give this request serious consideration and let me know within the next few days just when we may meet so that we may further discuss this matter.

Very truly yours,
JOHN J. LUNIN
Secretary-Treasurer
Business Manager

G. C. EXHIBIT #6.

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

..... Local Union No. .... Date 8/31/48
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print full name) Lawrence Nesta Occupation Driver-Salesman

Home Address 2328 NW 6 Ave Phone 95085

Business Address 1655 N. Miami Ave Phone 2-5176—2-5177

Employer and Place Employed Mr. Tobin—7Up Bottling Co.

Initiation Fee $..... Paid to .....
Date of Birth 7#23#17 Health Good Social Security No. 144-16-3491

LAWRENCE NESTA
Signature of Applicant

Witnessed:
N. FREEMAN

G. C. EXHIBIT #7.

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

..... Local Union No. 390 Date 8-10-48
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print Full Name) Joseph L. Klein Occupation Salesman

Home Address 344 Michigan Ave Phone 5-3525

Business Address 1655 N. Miami Ave Phone 2-5176

Employer and Place Employed A. J. Tobin Seven Up Bottling Co.

Initiation Fee $5.00 Paid to .....

Date of Birth 1-24-09 Health Good Social Security No. 265-09-7766

JOSEPH L. KLEIN
Signature of Applicant

Witnessed:
N. FREEMAN

Enter on Ledger

BK

G. C. EXHIBIT #8.

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

..... Local Union No. .... Date 8/15/48
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print Full Name) Marvin Leslie Walls Occupation Dr.-Sales.

Home Address 1160 NE 142 St Phone .....

Business Address 7 Up Bottl. Plant Phone .....

Employer and Place Employed Tobin 7Up

Initiation Fee $..... Paid to .....

Paid

Date of Birth 12-12-18 Health Good Social Security No. 265-16-7007

MARVIN L. WALLS,
Signature of Applicant

Witnessed:
N. FREEMAN

BK

G. C. EXHIBIT #9.

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

..... Local Union No. ... Date 8-18-48
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print Full Name) James Paul Yost Occupation Driver for 7-Up

Home Address 81 S. W. 72nd Ave phone .....

Business Address 37th St & Miami Ave. Phone 2-5176

Employer and Place Employed Mr. Tobin—7-Up Bottling Co.

Initiation Fee $..... Paid to .....

Date of Birth 8-18-48 Health Good Social Security No. 267-18-7441

JAMES P. YOST
Signature of Applicant

Witnessed:
N. FREEMAN

BK

Pd

G. C. EXHIBIT #10.

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

..... Local Union No. 390 Date 8/10/48
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose

and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print Full name) Walter Croon Occupation Route Salesman

Home Address 793—N. E. 90 St Phone 7-9270

Business Address 38 St Miami Ave Phone 2-5176

Employer and Place Employed 7 Up Bottling Co.

Initiation Fee $..... Paid to .....

Date of Birth 6/27/16 Health Good Social Security No. 053-10-2605

WALTER CROON
Signature of Applicant

Witnessed:
N. FREEMAN

Paid 5.00

BK

G. C. EXHIBIT #11.

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

..... Local Union No. 390 Date 8/16/48
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print Full Name) Nat Freeman Occupation Route Salesman

Home Address 750 Pennsylvania Phone 55134

Business Address 3730 No Miami Ave Phone 7-5639

Employer and Place Employed 7 Up Bottling Co. 1655 No Miami Ave

Initiation Fee $ ..... Paid to .....

Date of Birth 3/3/08 Health Good Social Security No. 051-05-3292

NAT FREEMAN
Signature of Applicant

G. C. EXHIBIT #12.

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

..... Local Union No. 390 Date 8/10/48
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print Full Name) Robert Davis Maccubbin
Occupation Driver-Sales.

Home Address 242 N. E. 32nd St. Phone .....

Business Address ..... Phone .....

Employer and Place Employed 7 Up

Initiation Fee $ ..... Paid to .....

Date of Birth 6/24/15 Health Good Social Security No. 163-01-6350

R. D. MACCUBBIN
Signature of Applicant

Witnessed:
N. FREEMAN

G. C. EXHIBIT #13.

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

..... Local Union No. .... Date 8/10/48
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print Full Name) Clifford H. Voight Jr Occupation Rout Salesman

Home Address 1020 Odalocka Blvd Phone None

Business Address ..... Phone .....

Employer and Place Employed 7 Up Bottling Co. 1655 Miami Ave.

Initiation Fee $ ..... Paid to .....

Date of Birth Mar. 27, 24 Health Good Social Security No. 142-16-5396

CLIFFORD H. VOIGHT, JR.
Signature of Applicant

Witnessed:
N. FREEMAN

G. C. EXHIBIT #14.

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

..... Local Union No. 390 Date 8-16-48
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print Full Name) William Gersham Wood
Occupation Salesman

Home Address 2256 N. W. 97th St. Phone .....

Business Address 3900 N. Miami Ave Phone .....

Employer and Place Employed Mr. Tobin 7 Up Bottling Co.

Initiation Fee $ ..... Paid to .....

Date of Birth 10-2-14 Health O. K. Social Security No. 256-07-3397

WILLIAM G. WOOD
Signature of Applicant

Witnessed:
N. FREEMAN

G. C. EXHIBIT #16.

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

..... Local Union No. .... Date .....
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose

and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print Full Name) Charles Franklin Fisher
Occupation Sales Driver

Home Address 2770 N. W. 57 St Phone 78-6237

Business Address ..... Phone .....

Employer and Place Employed 7 Up Bot. Co.

Initiation Fee $ ..... Paid to .....

Age 26 Health Perfect Social Security No. .....

No. .....

CHAS. F. FISHER
Signature of Applicant

Witnessed:
N. FREEMAN

G. C. EXHIBIT #17.

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

..... Local Union No. .... Date 8/31/48
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print Full Name) Robert Wendell Studley
Occupation Sales Driver

Home Address 399 N. W. 98th St Phone .....

Business Address ..... Phone .....

Employer and Place Employed 7-Up Bot. Co.

Initiation Fee $ ..... Paid to .....

Age 34 Health Good Social Security No. 017-03-0058

No. .....

ROBERT STUDLEY
Signature of Applicant

Witnessed:
N. FREEMAN

G. C. EXHIBIT #18.

Payroll.

August 18. 1948.

	Coolers	Salary	S. S.	W. T.	Net	Adv.	Amt. Rec.
W. Croon		54.53	.55	4.30	49.68	.21	49.47
J. Yost	(4.00)	67.98	.68	4.30	63.00	1.88	61.12
G. Wood		63.45	.63	3.70	59.12	.89	58.23
H. Miley	(5.00)	49.10	.49	—	48.61	3.42	45.19
R. Maccubbin		53.26	.53	4.20	48.53	16.96	31.57
E. Heatherington		34.78	.35	1.30	33.13	17.12	16.01
R. Nelson		49.48	.49	3.60	45.39	.32	45.71
T. Shannon		91.52	.92	9.80	80.80	.36	80.44
J. Klein	(5.00)	76.75	.77	7.70	68.28	.27	68.01
N. Freeman		49.91	.50	—	49.41	7.17	56.58
M. Walls		40.00	.40	.30	39.30	—	39.30
D. Chapman			vacation				
C. Carnifax		80.00	.80	4.40	74.80	6.26	68.54
C. Dismukes		80.00	.80	6.40	72.80	.80	72.00
W. Lutz		50.00	.50	3.70	45.80		45.80
G. Prescott		75.00	.75	1.60	72.65		72.65
E. Gallagher		60.00	.60	—	59.40	59.40	—
L. Baruch		75.00	.75	5.50	68.75		68.75
H. Seneker		32.50	.33	2.90	29.27		29.27
E. Snyder		18.48	.18	.80	17.50	17.50	—
E. Hokin		21.00	.21		20.79		20.79
D. Cohen		100.00	1.00	7.70	91.30		91.30
A. Mack		48.21	.48	3.40	44.33	2.00	42.33
W. Treacy		51.21	.51	1.90	48.80		48.80
R. Bobbe		38.06	.38	3.80	33.88		33.88
H. Tripp		48.45	.48	1.50	46.47		46.47
C. Newman		37.10	.37		36.73		36.73

Coolers	Salary	S. S.	W. T.	Net	Adv.	Amt. Rec.
R. Lucas	30.45	.30		30.15	30.15	—
S. Christos	29.40	.29		29.11		29.11
A. McDuffie	36.90	.37	3.50	33.03		33.03
L. Nesta	37.10	.37	1.80	34.93		34.93
L. Marshall	46.30	.46		45.84	9.21	36.63
T. Goodmond	38.40	.38		38.02	9.21	28.81
	1664.32	16.62	88.10	1559.60	168.15	1391.45
By check	85.45	.90		84.55	84.55	
	1578.87	15.72	88.10	1475.05	83.60	1391.45

Sales—7-up	$ 776.76
Sales—Coolers	14.00
Labor	541.58
Office	146.98
Adv.	50.00
Truck	75.00
Refrig.	60.00
	$1664.32

G. C. EXHIBIT #19.

Payroll.

August 25, 1948.

	Salary	S. S.	W. T.	Net	Adv.	Amt. Rec.
M. Walls	57.50	.58	2.80	54.12	2.35	51.77
W. Croon	53.76	.54	4.20	49.02	2.39	51.41
J. Yost (5.00)	64.78	.65	4.00	60.13	1.23	58.90
G. Wood	64.57	.65	4.00	59.92	1.22	58.70

	Salary	S. S.	W. T.	Net	Adv.	Amt. Rec.
H. Miley (4.00)	42.00	.42	—	41.58	11.00	30.58
R. Maccubbin	50.00	.50	3.70	45.80	14.02	31.78
					24.86	
E. Hetherington	41.78	.42	2.40	38.96	14.10	
R. Nelson	50.85	.51	3.70	46.64	1.68	44.96
T. Shannon	75.28	.75	5.50	69.03	1.86	67.17
J. Klein	73.92	.74	7.10	66.08	10.24	55.84
(5.00)						
N. Freeman	55.00	.55	.60	53.85	1.27	52.58
C. Voight	40.00	.40	4.10	35.50		35.50
S. Wyche	7.07	.07	—	7.00	7.00	—
D. Chapman	80.00	.80	4.40	74.80	.40	74.40
C. Carnifax	80.00	.80	4.40	74.80	1.40	73.40
C. Dismukes	80.00	.80	6.40	72.80	—	72.80
W. Lutz	50.00	.50	3.70	45.80	5.32	40.48
G. Prescott	75.00	.75	1.60	72.65		72.65
R. Brown	45.83	.46	3.00	42.37		42.37
L. Baruch	75.00	.75	5.50	68.75		68.75
H. Seneker	32.50	.33	2.90	29.27		29.27
E. Hokin	40.00	.40	.30	39.30		39.30
D. Cohen	100.00	1.00	7.70	91.30	1.20	90.10
A. Mack	48.48	.48	3.40	44.60		44.60
W. Treacy	48.03	.48	1.50	46.05		46.05
R. Bobbe	35.88	.36	3.40	32.12		32.12
H. Tripp	44.34	.44	.90	43.00		43.00
C. Newman	36.58	.37	—	36.21		36.21
S. Christos	32.90	.33		32.57		32.57
A. McDuffie	35.10	.35	3.40	31.35		31.35
L. Nesta	36.40	.36	1.60	34.44		34.44
L. Marshall	28.80	.29		28.51		28.51
T. Goodmond	28.90	.29		28.61		28.61
	1710.25	17.12	96.20	1596.93	96.76	1500.17

Sales—7-up	902.51
Sales—coolers	14.00
Labor	475.41
Office	147.50
Adv.	50.00
Truck	75.00
Refrig.	45.83
	1710.25

G. C. EXHIBIT #20.

Payroll.

Sept. 1, 1948.

	Salary	S. S.	W. T.	Net	Adv.	Amt. Rec.
M. Walls	57.71	.58	2.80	54.33	3.86	50.47
W. Croon	49.94	.50	3.60	45.84	.41	45.43
C. Voight	43.04	.43	4.60	38.01	2.07	35.94
J. Yost	59.25	.59	3.10	55.56	2.88	52.68
G. Wood	56.00	.56	2.70	52.74	.75	51.99
R. Maccubbin	47.84	.48	3.30	44.06	8.56	35.50
R. Nelson	45.74	.46	3.00	42.28	.57	41.71
T. Shannon	63.59	.64	3.70	59.25	.27	58.98
J. Klein	61.98	.62	5.30	56.06	.80	55.26
N. Friedman	43.98	.44		43.54	2.36	41.18
L. Case	20.00	.20		19.80		19.80
R. Studley	26.67	.27		26.40		26.40
L. Nesta	38.90	.39	1.90	36.61		36.61
D. Chapman	80.00	.80	4.40	74.80	.10	74.70
C. Carnifax	80.00	.80	4.40	74.80	14.94	59.86
C. Dismukes	80.00	.80	6.40	72.80		72.80

	Salary	S. S.	W. T.	Net	Adv.	Amt. Rec.
W. Lutz	25.00	.25		24.75	24.75	
G. Prescott	62.50	.63		61.87		61.87
R. Brown	55.00	.55	3.50	49.95	10.00	39.95
L. Baruch	75.00	.75	5.50	68.75		68.75
H. Seneker	32.50	.33	2.90	29.27		29.27
E. Hokin	40.00	.40	.30	39.30		39.30
D. Cohen	100.00	1.00	7.70	91.30		91.30
A. Mack	46.11	.46	3.10	42.55		42.55
W. Treacy	50.36	.50	1.80	48.06		48.06
R. Bobbe	42.00	.42	4.40	37.18		37.18
H. Tripp	55.78	.56	2.50	52.72		52.72
C. Newman	37.80	.38		37.42		37.42
S. Christos	37.33	.37		36.96		36.96
A. McDuffie	40.28	.40	4.10	35.78		35.78
L. Marshall	31.80	.32		31.48		31.48
J. Deverow	31.50	.32	.90	30.28		30.28
E. Hanna	10.33	.10		10.23		10.23
J. Marshall	6.10	.06		6.04		6.04
	1634.03	16.36	86.90	1530.77	72.32	1458.45

Sales—7-up	835.74
Labor	508.29
Office	147.50
Adv.	25.00
Truck	62.50
Refrig.	55.00
	1634.03

G. C. EXHIBIT #21.

Payroll.

Sept. 8, 1948.

	Salary	S. S.	W. T.	Net	Adv.	Amt. Rec.
M. Walls	38.73	.39		38.34	.35	38.69
W. Croon	38.24	.38	1.90	35.96	.05	35.91
C. Voight	30.26	.30	2.50	27.46	15.16	12.30
J. Yost	42.90	.43	.60	41.87	.50	41.37
G. Wood	39.15	.39		37.76	.61	38.15
R. Muccubbin	29.50	.30	.60	28.60	.41	28.19
R. Nelson	67.93	.63	6.20	61.05	3.56	57.49
T. Shannon	46.64	.47	1.20	44.97	.36	44.61
J. Klein	47.90	.48	3.30	44.12	.20	43.92
N. Freeman	35.72	.38		35.34	.16	35.18
C. Fisher	26.67	.27	.10	26.30		26.30
L. Case	20.00	.20		19.80		19.80
D. Chapman	80.00	.80	4.40	74.80	.65	75.45
C. Carnifax	80.00	.80	4.40	74.80	1.46	73.34
C. Dismukes	80.00	.80	6.40	72.80	.40	72.40
G. Prescott	87.50	.87	3.20	83.43	20.78	62.65
R. Brown	55.00	.55	4.50	49.95	5.00	44.95
L. Baruch	75.00	.75	5.50	68.75		68.75
H. Seneker	32.50	.33	2.90	29.27		29.27
E. Hokin	40.00	.40	.30	39.30		39.30
D. Cohen	100.00	1.00	7.70	91.30		91.30
A. Mack	43.55	.44	2.70	40.41		40.41
W. Treacy	34.99	.35		34.64		34.64
R. Bobbe	25.90	.26	1.90	23.74		23.74
H. Tripp	33.85	.34		33.51		33.51
C. Newman	27.20	.27		26.93		26.93
S. Christos	28.00	.28		27.72		27.72

	Salary	S. S.	W. T.	Net	Adv.	Amt. Rec.
L. Nesta	26.67	.27	.10	26.30		26.30
L. Marshall	18.60	.19		18.41		18.41
J. Devefow	18.60	.19		18.41		18.41
E. Hanna	28.00	.28	2.20	25.52		25.52
R. Sudley	26.67	.27		26.40		26.40
J. Marshall	18.60	.19		18.41		18.41
R. Hewitt	8.40	.08		8.32		8.32
R. Ventgewall	8.93	.09		8.84		8.84
	1441.60	14.47	62.60	1364.53	47.65	1316.88

Sales—7-Up	756.98
Labor	394.62
Office	147.50
Truck	87.50
Refrig.	55.00
	1441.60

RESPONDENT'S EX. #1.

No. ....

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

..... Local Union No. .... Date 9-7-48
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print Full Name) Erving A. Hanna Occupation Helper

Home Address 39 N. W. 8th St. Mailing address BO. Box 424 Phone .....

Business Address 3730 N. Miami Ave 7-Up Phone .....

Employer and Place Employed Sherman 3730 N. Miami Ave.

Initiation Fee $5.00 Paid to .....

Date of Birth 3/13/1903 Health ..... Social Security No. 566-03-5075

ERVING ALFRED HANNA
Signature of Applicant

Witnessed:
N. FREEMAN

Pd
Bk

RESPONDENT'S EXH. #2.

No. ....

Application for Membership

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

...., Local Union No. .... Date 9/7/48
Date of Application

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. If admitted to membership, I agree to abide by the constitution of the International as well as the local constitution and by-laws which are not in conflict with the International laws.

Name (Print Full Name) Henry Allen Tripp Occupation Bottler

Home Address 1866 N W 20th Ave Phone .....

Business Address ..... Phone .....

Employer and Place Employed 7 Up Bottling Co.

Initiation Fee $ ..... Paid to .....

Date of Birth 12/22/20 Health O. K. Social Security No. 415-16-8105

HENRY ALLEN TRIPP
Signature of Applicant

Witnessed:
N. FREEMAN

RECORD

VOLUME

III

Vol III

No. 217

Office - Supreme Court, U. S.
FILED
JUL 21 1952

APPENDIX TO RESPONDENT'S BRIEF.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

No. 13,714.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SEVEN UP BOTTLING COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

U. S. COURT OF APPEALS
FILED
SEP 7 1951
Gathy J. Dodd

INDEX.

Page

Witnesses on Behalf of National Labor Relations Board.

Sherman Tobin—
Direct examination..... 1
Cross-examination..... 3

John J. Lunin—
Direct examination..... 6
Resumed:
Cross-examination..... 16

Louis M. Baruch—
Direct examination..... 9
Cross-examination..... 9

Lawrence T. Nesta—
Direct examination..... 11

Joseph L. Klein—
Direct examination..... 13

Marvin Leslie Walls—
Direct examination..... 24

James Paul Yost—
Direct examination..... 27

Walter Croon—
Direct examination..... 29

Nat Freeman—
Direct examination..... 31

Francis J. Reilly—
Direct examination..... 35
Cross-examination..... 36

Respondent's Witnesses.

Arthur Mack—
Direct examination..... 40
Cross-examination 45

William J. Treacy—
Direct examination..... 45

Charles H. Carnifax—
Direct examination..... 48
Cross-examination 51
Redirect examination..... 51

Charles Mason Dismukes—
Direct examination..... 52
Cross-examination 64

Clifford Holmes Voight—
Direct examination..... 68
Cross-examination 69

Sherman Tobin—
Direct examination..... 71
Cross-examination 86
Redirect examination..... 88

Exhibits.

General Counsel's Exhibit No. 22. Letter dated Oct. 18, 1948, to Mr. Paul L. Styles, Regional Director, from S. J. Tobin, Secretary-Treasurer..... 95

Respondent's Exhibit No. 5. Payroll, week of Sept. 15, 1948..... 97

APPENDIX TO RESPONDENT'S BRIEF.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

No. 13,714.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SEVEN UP BOTTLING COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

25* SHERMAN TOBIN,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * * * * *

Direct Examination.

Q. (By Mr. Pate) Mr. Tobin, you are connected with the Seven Up Bottling Company of Miami, are you not?

A. Yes, I am.

Q. In what capacity?

---

* Inset numbers appearing at outer edge of text indicate page numbers of original stenographic transcript of testimony.

A. Well, I am secretary-treasurer of the corporation.

Q. And how long have you held that position?

A. That has been since April 1, 1948.

Q. Since April 1, 1948?

A. Yes.

Q. Can you tell us who the other officers of the corporation are?

A. Yes. Mr. A. J. Tobin, president, and Mrs. Rebecca Tobin, vice-president.

Q. There are no other officers other than you three?

26 A. No other officers.

Q. Mr. A. J. Tobin was president during the year 1948 and at all times since then, is that correct?

A. The business was incorporated April 1, 1948.

Q. And since the incorporation the officers have remained the same?

A. Yes, that is correct.

* * * * * * *

32 Q. (By Mr. Pate) Did each employee at that time work on all those operations, or were they divided up among the employees?

A. No, each employee worked on all operations. They are changed around from one location to another location. I might state that the reason for the changing of location is because they are tedious jobs. It is necessary to change them because one man might become tired if he were to remain long on one specific job.

* * * * * * *

47 Q. And he would have the authority to make a discharge if it was necessary?

A. No, Mr. Dismukes is not empowered with the authority to fire anybody.

Q. Who has that power?

A. That is Mr. A. J. Tobin.

Q. Mr. A. J. Tobin alone?

A. He alone.

* * * * * * *

59 Trial Examiner Hunt: I would like to ask you one question, and that is this: Who loaded the trucks?

The Witness: Who loaded the trucks?

Trial Examiner Hunt: Yes.

The Witness: Plant employees and driver-salesmen.

* * * * * * * *

67 **Cross-Examination.**

* * * * * * * *

Q. All right. Now, Mr. Tobin, let me ask you this: Who is the executive head or the corporate head of the

68 Seven Up Bottling Company?

A. Mr. A. J. Tobin is the president of the corporation.

Q. Mr. Tobin, how many directors are there in the corporation?

A. There are three.

Q. Are you a director?

A. Yes, I am.

Q. Who are the other two?

A. Mr. A. J. Tobin and Rebecca Tobin.

Q. Mr. A. J. Tobin is your father?

A. Yes, and Rebecca Tobin is my mother.

Q. Do you know, Mr. Tobin, in what form the business operated prior to its incorporation in April, 1948?

A. Prior to its incorporation the business was an individual proprietorship.

Q. And who was the proprietor?

A. It was owned solely by Mr. A. J. Tobin.

Q. How old are you, Mr. Tobin?

A. Twenty-six.

Q. How long have you been with the Seven Up Bottling Company?

A. I have been with the Company since early 1946, when I left college.

Q. At the time you went with the business it was your father's business, is that right?

69 A. That is right. He was the sole owner.

Q. What was your position with the business prior to the incorporation of the business?

A. I was just on the pay roll as an employee.

Q. As an employee?

A. That is correct.

Q. Now, Mr. Tobin, what proportion of the capital stock of the business do you now own?

A. I have 25 percent of the stock at the present time.

Q. And there are 100 shares?

A. One hundred shares issued.

Q. And you have 25 of them?

A. That is correct.

* * * * * * *

70 Q. Did other employees other than these colored employees assist in loading and unloading trucks?

A. Yes. When we got into the busy season, which is mainly during the wintertime if we had to load all

71 the trucks out or double-load them during the day, everybody who was available would pitch in and load the trucks. In fact, the plant employees would take those trucks and drive them out to meet the other man and take back his empty truck, thus saving him time.

* * * * * * *

Q. Do you have an employee known as a refrigeration man?

A. Yes.

Q. What are his duties and functions?

A. To keep all refrigeration equipment—vending machines which dispense our product—in working order.

Q. Is his work performed in or out of the several offices or plants of the company?

A. The majority of his work is performed outside, keeping the equipment in running order.

Q. Those vending machines and that refrigeration equip-

ment—is that equivalent to the route the men de-
72 liver the bottled drinks to?

A. Yes, they bring the merchandise to them.

Q. If the machines are not running, the driver-salesman cannot deliver the drinks?

A. If it was not running he would lose the sale.

Q. Who would notify the refrigeration man of a broken-down machine or whatever it is?

A. The driver-salesman can either make the report to the office direct, or he can call the sales manager and make the report to him. When notice comes in to the office it is relayed to the refrigeration man.

Q. Do you have an employee or employees known as advertising men?

A. Yes, we do.

Q. What do they do?

A. The advertising man's responsibility and job is to place outside advertising throughout the territory that we service.

Q. Is there any connection between their function and that of the driver-salesmen?

A. If he doesn't place the advertising, the driver-salesmen would lose business, which has been shown to be a fact in the soft drink business.

Q. Is there any interchange of requests between driver-salesmen?

A. Well, the driver-salesmen see the advertising man
73 every evening and can turn requests over to him directly for placement of locations.

Q. Is that advertising material placed in part in the plants or the stores or the locations of customers of the driver-salesmen?

A. The majority of it is placed outside and inside the locations of customers—stores.

Q. Now, Mr. Tobin, where does the driver-salesman get his calls or orders, as far as your operation is concerned?

A. Well, the driver-salesman gets his calls for extra mer-

chandise at our office, where one of the office girls keeps a record of calls when stores run out of merchandise. They call up and get their orders for delivery there.

Q. Does the driver-salesman phone in to the office for those orders?

A. The ones who are far away phone in. The ones right in the downtown area close by to the office, stop by.

Q. Stop in and pick up the calls as they are received?

A. That is right.

Q. Now, Mr. Tobin, what was your policy as to the source of the selection of trainees in September and August of 1948? Where did you get trainees from?

A. During that time, in September and August, when we hired a trainee, he was placed in the plant or else he was taken directly from the plant when we thought he
74 was capable of holding down an outside position. He was advanced and given further training for an outside salesman's position. Some salesmen were taken directly from the outside and put into sales positions, but at this time the majority were taken from the plant.

Q. The majority were taken from the plant?

A. That is correct.

* * * * * * *

78 JOHN J. LUNIN,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was ex-
79 amined and testified as follows:

Direct Examination.

* * * * * * *

115 Q. After the conversation that you had with Mr. Tobin on September 7 did you ever have any further conversation with him?

A. I did.

Q. When was the next time that you talked with Mr. Tobin?

A. I met Mr. Tobin about three days later.

Q. You are still referring to Mr. Sherman Tobin when you refer to Mr. Tobin?

A. Yes, sir.

116 Q. Where did this meeting three days later take place?

A. At the plant.

Q. What part of the plant?

A. On the outside of the plant, as you were going in.

Q. Who was present on that occasion?

A. Myself, Joe Klein was on the picket line then, and Frank Reilly.

Q. Was Joe Klein one of the driver-salesmen?

A. Yes.

Q. Who was on strike?

A. Yes, sir.

Q. Was anyone present there besides you three and Mr. Tobin?

A. No, sir.

Q. What was the occasion for your being there?

A. I asked him to put the men back to work, pending the findings of the National Labor Relations Board.

* * * * * * *

117 Q. (By Mr. Pate) Mr. Lunin, you testified about one conversation with Mr. Tobin about three days after September 7?

A. Yes, sir.

118 Q. After that did you have another conversation with him?

A. Yes.

Q. Where did this conversation take place?

A. Also at the plant.

Q. When was that?

A. That was on Saturday—the Saturday of the week that the men went out to strike.

Q. Where was it, at the plant?

A. Between the main entrance and the rear of the building.

Q. Who was present on that occasion?

A. Mr. Tobin; I believe Mr. Dismukes; Mr. Reilly and myself.

Q. Will you relate for us the conversation that took place on that occasion?

A. I asked him again, wouldn't he please put these men back to work pending the findings of the NLRB. He said, "I have new men to replace them and they are going to go to work on Monday morning."

* * * * * * * *

119 Q. Did you talk with Mr. Tobin again after that occasion?

A. I did.

Q. When was that?

A. About the sixteenth of the month again.

Q. Where did you talk with him on that occasion?

A. At his office.

Q. Who was present then?

A. His bookkeeper, I believe, was in the office, and I again asked him.

Q. Just a minute. Let's be sure who was present. You were there?

A. I was.

Q. Mr. Tobin?

A. Mr. Tobin.

Q. Was anybody else there besides you and the bookkeeper?

A. Frank Reilly.

Q. Did the bookkeeper participate in the conversation?

A. No, sir.

Q. Relate for us the conversation that occurred on that occasion.

A. I again asked him whether he wouldn't put these men back to work pending the findings of the NLRB—

120 that all we asked for was recognition.

* * * * * * *

126 Q. Will you refer to the card and tell us the date of Mr. Shannon's initiation?

A. Yes. He transferred into this local union on October 3, 1948.

* * * * * * * *

128 LOUIS M. BARUCH,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * * * * *

Direct Examination.

Q. (By Mr. Pate) Mr. Baruch, have you ever been employed by the Seven Up Bottling Company of Miami?

A. Yes, I have.

Q. Are you employed there now?

A. No, I am not.

* * * * * * * *

135 **Cross-Examination.**

* * * * * * * *

137 Q. You were discharged about the 25th of September?

A. Around that time—toward the end of the month.

Q. And was the discharge a discharge for cause stated to you, or what?

A. There was cause stated.

Q. What was the cause stated?

A. Mr. Tobin, Sherman Tobin, called me in and told me that I was being discharged because I did not take a sufficient interest in the company.

* * * * * * * *

138 Q. Had you had some controversy with the company about overtime pay?

A. No, I didn't.

Q. You say you did not?

A. Not at that time.

Q. Did you subsequently have a controversy with the company?

A. No, not that I recollect.

Q. Had you previously had such a controversy?

A. No, sir.

Q. Did you ever file a claim with Wage and Hour?

A. Yes, I did. That was much later.

Q. Was that involving the Seven Up Bottling Company?

A. Yes, it was.

Q. Was it as a result of your contention that the company hadn't treated you properly—hadn't paid you the proper amount of wages?

A. That was my charge, yes.

Q. And you did bring that charge against the company with the Wage and Hour Administration?

A. Yes, I did.

* * * * * * * *

139 Trial Examiner Hunt: The question is this: As far as you were concerned, was the severance of your employment on a friendly basis?

A. No, I would not say exactly that it was.

* * * * * * * *

141 A. Lawrence Nesta was at that time, I believe, a factory employee, not working on a truck.

Q. All I ask you, Mr. Baruch, is whether he was paid for Labor Day.

A. He was paid for the number of hours he worked. He was paid on an hourly basis.

* * * * * * * *

144 Q. Don't you remember that the men were paid off on Friday and they were allowed to come into that office individually and receive their pay?

A. Yes, they were. I remember that clearly.

Q. They more or less gathered outside the office and were allowed to come in one at a time?

A. That's right.

Q. And they were paid in cash, were they?

A. Yes.

Q. Now, Mr. Baruch, who hired you at the Seven Up Bottling Company?

A. Mr. Tobin, Sr., originally hired me. He had me come down to the office and meet Sherman Tobin, and then they put me on.

Q. Did Mr. A. J. Tobin spend any time at the plant or at the office?

A. Well, what is it?

Q. At the office—the place you worked?

A. Yes. He spent quite a bit of time there.

Q. Was he in charge while you were there?

145 A. Was he in charge?

Q. Yes.

A. In a way, I would say he was.

Q. Did he give the directions?

A. He was my employer.

Q. Did he give directions?

A. Yes, he did.

* * * * * * * *

153 LAWRENCE T. NESTA,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * * * * *

Direct Examination.

* * * * * * * *

156 Q. No. Where did you work for the Seven Up Bottling Company?

A. At the new plant.

Q. Did you work in the manufacturing plant?

157 A. Yes, sir, inside, in the bottling end.

Q. What kind of work did you do?

A. All-around man. Filler, spinner, stacker, loader.

Q. Did you ever change jobs with the company after that?

A. No, sir.

Q. You never did change for doing—to do any other work for the company?

A. Oh, yes. I went out on a truck.

* * * * * * *

178 Q. That was the meeting where you took the written strike vote, is that right?

A. Yes, sir.

Q. That was on Sunday, September 5?

A. That's right.

Q. And that was the meeting that you elected Mr. Freeman and the other members of the committee?

A. Yes, sir.

* * * * * * *

180 Q. Who went across the second time?

A. The committee, Mr. Lunin, and Mr. Reilly.

Q. Are you sure the committee was there?

A. I'm very positive.

Q. What entrance of the plant did they go in?

181 A. Through the front door.

Q. Through the front door?

A. Yes, sir.

Q. And the committee consisted of Mr. Klein—

A. No, sir. Not Mr. Klein.

Q. Mr. Lunin, Mr. Reilly, Mr. Freeman—five people in all who went through the front door when Mr. Tobin was there?

A. Yes, sir.

Q. And you saw them when they were engaged with Mr. Tobin?

A. That's right.

Q. Where were they standing in the plant?

A. In the rear of the plant, at the big door.

Q. They were standing in the rear of the plant?

A. Right where they load the truck.

Q. So they had to walk all the way through the plant?

A. Yes, sir.

Q. Where were you standing?

A. Across the street.

Q. Across the street?

A. Yes, sir.

Q. And you could see them across the street in the full length of the plant?

A. Yes, sir.

Q. And that was through the door or window?

A. Through the window.

* * * * * * * *

194 JOSEPH L. KLEIN,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * * * * *

Direct Examination.

* * * * * * * *

216 Q. Now, Mr. Klein, during that period from the time Mr. Tobin came until the time you last worked there, do you remember Sherman Tobin as a little boy, growing up around there?

A. That's right.

Q. He hung around as a kid, didn't he?

A. He didn't hang around there so much.

Q. I mean he came around there—you saw him there as a youngster?

A. That's right.

Q. Then he went off to school?

A. That's right.

Q. Came back, got married, and finally went to work for papa, didn't he?

A. That's right.

Q. And Mr. Tobin—Mr. A. J. Tobin—was the man who was running the business after he bought it, wasn't he?

A. That's right.

Q. Mr. A. J. Tobin was the boss as far as you were concerned, wasn't he?

A. That's right.

Q. You knew that?

217 A. Yes.

Q. As a matter of fact, when you filled out this card, where it says "By whom employed," you said "A. J. Tobin, Seven Up Bottling Company," didn't you?

A. That's right.

Q. There wasn't any question on your part or on the part of the other employees as to who was the boss down there, was there?

A. That's right.

* * * * * * * *

220 Q. The last meeting was the meeting held on the morning of the strike?

A. That's right.

221 Q. And there was a first meeting when you talked about the benefits of belonging to the union?

A. That's right.

Q. And there was a meeting then between, when you took the strike vote and elected the committee, and all that sort of thing?

A. That's right.

Q. Is that correct?

A. Yes, sir.

* * * * * * * *

Q. How long was it that you fellows decided by this vote to strike—how long was it between there, roughly, and the time you actually had the strike?

A. About a week.

Q. You think about a week between the two?

A. Yes.

Q. You don't remember a meeting on a Sunday before the strike on Tuesday—the Sunday before Labor Day?

A. I don't remember.

* * * * * * * *

226 Q. Where were you when you signed this card, Mr. Klein?

A. I think I was in my car.

Q. It was not at a meeting?

A. No.

* * * * * * * *

229 Q. And it is your testimony that a committee consisting of Mr. Lunin, Mr. Reilly, Mr. Freeman, Mr. Shannon and Mr. Croon went into the back gate of the plant and talked to Mr. Dismukes, is that right?

A. That's right.

Q. And they came out and then later they went back in—the same group went back in and talked to Mr. Dismukes and Mr. Tobin, is that right?

A. That's right. The second time they went inside the plant.

Q. The second time they went inside the plant?

A. That's right.

Q. The second time did they go in the front door?

230 A. Yes.

* * * * * * * *

235 Q. Now, did you get paid the week of the strike?

A. Yes, I did.

Q. Where did you get your pay?

A. At the office.

Q. Did you go inside to get it?

A. I did.

Q. Was the conversation you had with Mr. Dismukes before or after that?

A. Before that.

Q. Before that?

A. That's right.

A. That's right.

236 Q. It was either on Tuesday, Wednesday or Thursday of that week?

A. Something like that.

Q. And were you ready to go to work?

A. I would have gone to work, I guess.

Q. What do you mean, you guess?

A. I guess I would have gone to work.

Q. Are you saying that you applied for your job, or were you just asking?

A. I was asking, Do you think I can get my job back? That's all.

Q. And if he had said "yes" would you have put your picket sign away and gotten on your truck?

A. I don't know.

Q. You don't know?

A. No.

* * * * * * * *

Q. You didn't tell him, "Mr. Dismukes, I want to go to work"?

237 A. That's right.

Q. And you don't know whether you would have gone to work even if he had told you to?

A. That's right.

* * * * * * * *

239 JOHN J. LUNIN

resumed the stand and was examined and testified further as follows:

240 **Cross-Examination.**

* * * * * * * *

Q. Is it your testimony, Mr. Lunin, that the only people who are members of that local are people who operate or handle motor-driven vehicles?

A. No.

Q. You have other membership other than motor-driven vehicle operators?

A. We have.

Q. Can you give us some indication of what the other categories of people that you might have in that local are?

A. Yes. Our international has jurisdiction over all classes of employees in the milk industry—in the dairy industry. Therefore, we are entitled to take in every-
241 body and anybody inside of a dairy plant, exclusive of office help, clerical help, or people in a supervisory capacity. We also can take into our local union people who work in a warehouse, such as warehousing, stacking, calling. I mean when stuff comes off the truck that has to be delivered into the warehouse or has to be moved from the warehouse. That comes under the category of warehousemen.

Q. What other categories, Mr. Lunin?

A. That's all.

Q. Do you have any contracts in the Greater Miami area with any beverage, bottling or related type of company?

A. Milk.

Q. Milk.

A. Yes.

Q. Do you object to naming one or two to us?

A. I do.

Q. With respect to these milk plants, do you represent all the employees of these plants?

A. I represent 85 percent of the employees of one plant; and I represent all the employees under my jurisdiction in another plant.

Q. Do you have contracts in those plants?

A. Yes, sir.

Q. In those milk contracts, Mr. Lunin, are there included in the unit the people who bottle the milk?

242 A. In the milk? Yes.

Q. And the people who load it on the trucks?

A. In milk, yes.

Q. And the people who unload it on the trucks?

A. In milk, yes.

Q. Is there some special constitutional or by-law limitation that limits you to representing those people only in the milk industry?

A. Yes, sir. Jurisdiction with the American Federation of Labor.

* * * * * * *

243 Q. (By Mr. Constangy) It is your contention now that you had no jurisdiction to organize the employees of the Seven Up Bottling Company other than the driver-salesmen?

A. No, sir.

Q. Did you have jurisdiction to organize all employees of that company?

A. I could organize them if I so chose to do.

Q. And no limitation in your constitution or the charter of your local?

A. No, sir.

* * * * * * *

244 Q. Now, Mr. Lunin, I hand you General Counsel's Exhibit 2-A and ask you to tell me just what that is.

A. That is just a petition to the National Labor Relations Board for an election.

Q. Filed by you, was it not?

A. Yes, sir.

Q. Can you tell us who you sought to represent in that petition?

A. All the employees, with the exception of the foremen, supervisors, all office and clerical help.

Q. Read that, please. What does it say?

A. All driver-salesmen and plant help.

Q. All driver-salesmen and plant help?

A. That's right.

Q. That was your first petition to the Labor Board, is that correct?

A. That's right.

Q. And that was a petition that you filed or that you swore to on September 13, 1948, is that right?

A. Yes, sir.

Q. That was during the pendency of this strike, was it not?

A. Yes, sir. That was after the strike.

Q. Was the strike over by then?

A. No, but they weren't picketing by then.

245 Q. They were not picketing by then?

A. No, sir.

Q. Be sure about that.

A. During the picketing. I'm sorry.

* * * * * * * *

Q. So September 13 would have been the following Monday. The strike started on Tuesday, and this was sworn to on the following Monday?

A. That's right.

* * * * * * * *

Q. At that time the petition which you have just identified as General Counsel's Exhibit 2-A was pending

246 in the National Labor Relations Board?

A. Yes, sir.

Q. It had been filed by you, had it not?

A. Yes, sir.

Q. And at that time you requested recognition, didn't you?

A. Yes, sir.

Q. For your union?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. As the representative of all employees of the Seven Up Bottling Company?

A. Yes, sir. All those except those that I quoted.

Q. All driver-salemen and plant help?

A. Yes.

* * * * * * * *

248 Q. All right. Now, Mr. Lunin, you felt that you were entitled to recognition as the bargaining agent for all driver-salesmen and plant help of the Seven Up Bottling Company at the time you filed this petition?

A. When I filed it.

249 Q. And then you later changed your mind, didn't you?

A. I did.

Q. How long after that did you change your mind, Mr. Lunin?

A. It was in October some time.

Q. To be specific, it was the 6th day of October, was it not?

A. Yes, sir. That is my handwriting. I read it.

* * * * * * * *

Q. Did you, on the 6th day of October, decide that was not the group you wanted to represent—that you only wanted to represent the driver-salesmen, is that right?

A. No, sir. I was told by our conference that the driver-salesmen were under my jurisdiction.

Q. Who told you that?

A. The main office. Mr. Prohl.

* * * * * * * *

Q. (By Mr. Constangy) Did he tell you that you could not have jurisdiction over the plant help?

A. Yes. He said I might run into a little controversy there.

Q. He said you might run into a little controvery there?

A. That's right.

250 Q. With whom?

A. With another jurisdiction.

* * * * * * * *

251 Q. Now, Mr. Lunin, had you organized or attempted to organize the plant help at the Seven Up Bottling Company?

A. I never attempted to organize the plant help.

Q. You never did?

A. No, sir.

Q. But you felt that they were appropriately a part of the unit?

A. They came to us.

Q. They came to you to be organized?

A. That's right.

Q. And you felt that they were appropriately a part of the unit?

A. I told them they would have to make out an application blank and then we would decide.

Q. And when they did you filed a petition, including them in the unit?

A. Yes, sir.

Q. Is that right?

A. That's right.

Q. Did they ever make applications?

A. Some of them did.

Q. Are they included in this batch of cards that you gave Mr. Pate?

A. I believe they are.

252 Q. Will you examine these cards and see if these are all you got from Seven Up employees, plus those two there (handing to witness)?

A. I wouldn't have them in here.

* * * * * * * * *

257 Q. As a matter of fact, the last meeting before the morning meeting was Sunday, was it not?

A. Sunday morning.

Q. The Sunday before Labor Day, wasn't it?

A. Yes, sir.

Q. Which would have placed it on September 5, wouldn't it?

A. I don't know.

Q. Do you want to look at this calendar?

A. No, that's all right. I take your word for it.

Q. And that was the meeting at which you took the strike vote, was it not?

A. No, sir. At the meeting before that.

Q. The meeting before that was when you took the strike vote?

A. That's right.

Q. How long before the Sunday meeting was the meeting at which you took the strike vote?

258 A. I believe it was about four days.

Q. About four days before the Sunday meeting?

A. Yes.

* * * * * * * *

Q. I want to know what happened at the Sunday meeting.

A. At the Sunday meeting we decided to meet in a body.

Q. Yes?

A. At six a. m. on Tuesday.

Q. That was all that took place at the Sunday meeting?

A. Yes, that's about all.

Q. Did you elect this committee at the Sunday meeting?

A. No, sir. This committee was elected before that, because that's the first thing I think I do, is ask for a committee.

* * * * * * * *

259 Q. And that was the meeting at which you also elected the committee?

260 A. The time of the strike vote, yes.

* * * * * * * *

264 Q. So you knew Mr. Tobin, Sr., was away?

A. That's right.

* * * * * * * *

268 Q. Did you ask Mr. Sherman Tobin on the morning of the strike to sign a recognition agreement?

A. I might have.

* * * * * * * *

271 Q. And was anything said after that?

A. Yes. I told him, I said, "You're taking the wrong attitude, Mr. Tobin, because we are a bona fide organization, licensed by the State. I am licensed by the State." I said, "And if you feel you can't do anything at this time we are willing to let it go to the National Labor Relations Board and let them decide." He wouldn't have any part of it, and he turned away from me. Then I walked out.

Q. Now, Mr. Lunin, did you then file a petition with the NLRB?

272 A. Yes, sir.

Q. That is the petition that we talked about earlier?

A. Yes, sir.

Q. The one you signed on September 13?

A. Yes, sir.

Q. In which you requested a bargaining unit of driver-salesmen and plant help?

A. Yes, sir.

Q. That is the petition that you wanted the NLRB to decide?

A. Then I amended it.

Q. I am talking about the one you were discussing with Mr. Tobin.

A. That's right.

Q. You did not amend it until later in October, did you?

A. It was in October.

Q. Well, now, Mr. Lunin was there ever any statement in any conversation between you and Mr. Sherman Tobin to the effect that he doubted that you had a majority?

A. Yes, sir.

Q. When did he say that?

A. He said that before I sent that letter.

Q. You mean the registered letter?

A. Yes, sir.

Q. He told you he doubted that you had a majority?

A. Yes, sir.

273 Q. Where was that conversation?

A. In his office.

Q. Was that the first time you saw him?

A. Yes, sir.

Q. In other words, that was the visit that you had with Mr. Tobin by himself?

A. Yes, sir.

* * * * * * * *

296 Q. But you did take them, though?

A. Yes.

Q. And you included them in your petition to the Board?

A. Yes.

* * * * * * * *

297 MARVIN LESLIE WALLS,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * * * * *

Direct Examination.

* * * * * * * *

301 Q. At any of those meetings was there a committee of any kind elected?

A. There was a committee elected. I believe it consisted of four men from the drivers that were nominated or selected to represent us.

Q. At which meeting was that?

A. I believe that was the first meeting.

* * * * * * * *

302 Q. Who was on that committee?

* * * * * * * *

A. Walter Croon, Nat Freeman, Joe Klein, and Ted Shannon.

Q. At any of these meetings was a strike vote taken?

A. Yes, there was.

Q. Was that at the same meeting or at a different meeting from the one when the committee was appointed?

A. I believe it was the same meeting.

• • • • • • • •

318 Q. So the first meeting that you went to would have been sometime after August 22?

A. Yes.

Q. Or thereabouts?

A. Yes.

Q. Now, at this first meeting, do you remember how many people were there?

A. Drivers, or everybody?

Q. Well, just generally.

A. About twelve.

Q. About twelve?

319 A. Twelve to fifteen.

• • • • • • • •

Q. Was that the meeting where the committee was elected?

A. I believe it was.

Q. And that committee consisted of Mr. Freeman, Mr. Croon, Mr. Shannon, and Mr. Klein, is that right?

A. That's right.

Q. Was that the meeting at which this strike vote was taken?

A. The strike vote was taken, I believe, at the next meeting.

Q. The strike vote was taken at the next meeting?

A. Yes.

Q. And then there was a meeting on the morning of the strike, is that right?

A. That's right.

• • • • • • • •

321 Q. That morning did any of the men who came with you to the plant go inside the plant, other than the committee?

A. Other than the men on the committee, Mr. Reilly and Mr. Lunin, no.

Q. None of them went in at all?

A. Just the committee, Mr. Lunin and Mr. Reilly.

Q. None of the others did?

A. None.

Q. And Mr. Freeman, Mr. Croon, Mr. Klein, and Mr. Shannon were the only ones who went in the plant at all that day?

A. That's right.

Q. And they went in twice?

A. That's right.

* * * * * * * *

322 Q. Did the bottlers come to work that morning?

A. The bottlers?

Q. Yes.

A. Yes, the bottlers came to work.

Q. Were they in the plant when this committee went in?

A. I don't think they were there the first time.

Q. Were they there the second time?

A. The second time, yes.

Q. Did they work all day, as far as you know?

A. I think they worked until noon.

Q. Did anything happen at noon so far as those people were concerned?

A. The bottlers decided to walk out too.

Q. The bottlers decided to walk out too?

A. I don't know whether it was the first day or the second day, but they came out with us too.

* * * * * * * *

325 Q. Now, Mr. Walls, did any of the plant help join on the picket line? The bottlers?

A. Yes.

Q. How many of them, do you know?

A. I think there were four men in the plant—bottlers—and I believe all four were with us.

Q. Did they participate in the picketing?

A. Yes.

Q. Did they carry signs as the other pickets did?

A. Yes, that's right.

Q. And they congregated with you as a relief team on the other side of the street?

A. Yes, sir.

* * * * * * * *

334 JAMES PAUL YOST,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * * * * *

353 Q. And it was at the meeting on Sunday that you took the strike vote and elected the committee, is that right—or selected the committee?

A. It was on the Sunday prior to the strike.

* * * * * * * *

354 Q. The morning of the strike when you came down there with the group from the meeting, were the plant people, the bottling people, in the plant? Were they working that morning?

A. Were they working?

Q. Yes.

A. Yes.

Q. They were at work that morning?

A. That's right.

Q. Did they subsequently come on out and join the strike?

A. They did, yes.

Q. Do you remember when that was?

A. As far as hours are concerned, no, but it was the same day.

Q. It was the same day?

A. Yes.

* * * * * * * *

355 Q. They came out after the drivers did, is that right?

A. After they had commenced picketing, yes.

Q. When you began picketing, they came out and joined, is that right?

A. That's right.

Q. Some of them picketed?

A. All did.

Q. All picketed?

A. Yes. Not at the same time though.

Q. But they all participated in the picketing?

A. That is correct.

* * * * * * *

Q. Were you around the plant at all on the Monday following the strike?

A. No, I started a new job on Monday.

Q. You started a new job on Monday?

A. That's right.

Q. Did you hear—I will withdraw that. Now, Mr. Yost, when the men came down there from the meeting on the morning of the strike, Mr. Lunin and Mr. Reilly went in and saw Mr. Dismukes, is that right?

A. That's right.

356 Q. Did they come out and go back in a second time when Mr. Tobin came in?

A. I am quite sure they did.

* * * * * * *

Q. Did you see who came in and went out for the union?

A. Well, as far as I could recall, Mr. Lunin came out and Mr. Reilly also, and then went back in later.

Q. Did Mr. Lunin report to you or to the group what had happened at the meeting with Mr. Tobin, or did he teill you?

A. All this, of course, is to the best of my knowledge.

357 Q. But did he tell you what had gone on or do you remember him telling you?

A. Yes, I am quite sure he did.

Q. Who was there when he told you?
A. What do you mean?
Q. Was the whole crowd still together?
A. They were all grouped together there.
Q. Was Mr. Freeman there?
A. Yes.
Q. Mr. Croon, was he there?
A. I'm quite sure he was.
Q. Mr. Shannon?
A. I believe all those gentlemen mentioned were there.

* * * * * * * *

Q. Were Mr. Freeman or any of the committeemen in there with him at the meeting?
A. You mean in the plant itself?
Q. Yes.
A. Not to my knowledge, no.
Q. To your knowledge neither Mr. Freeman, Mr. Croon, Mr. Shannon nor Mr. Klein were in there with him at the meeting?
A. To my knowledge, no.

* * * * * * * *

360 WALTER CROON,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * * * * *

Direct Examination.

* * * * * * * *

378 Q. Now, Mr. Croon, you have seen Mr. Tobin, Sr.—this man's father—around the plant, haven't you (indicating Mr. Sherman Tobin)?
A. Yes, sir.
Q. Do you know what position he occupied with the company?
A. No, sir, I don't.

Q. Was he the boss?

A. In our opinion, he was.

Q. In your opinion, he was?

A. He was the president, if I am not mistaken.

* * * * * * * *

380 Q. Did you ever attend a union meeting on the Sunday before Labor Day?

381 A. I did.

Q. Was that the union meeting in which a strike vote was taken?

A. I believe it was.

Q. Was that the union meeting in which the committee was elected?

A. No, sir.

Q. Was the committee elected at a different meeting?

A. Yes, sir.

Q. Was it before that, or after?

A. I believe it was the meeting before that.

* * * * * * * *

382 Q. Who went into the plant, Mr. Croon?

A. Mr. Lunin, Mr. Reilly, Mr. Freeman, myself and Mr. Shannon, I believe.

Q. Mr. Klein didn't go in?

A. I don't know. I wouldn't say definitely whether he did or not.

Q. But you are perfectly sure you went in?

A. Yes, sir.

Q. Where did you go?

A. Toward the back of the plant.

* * * * * * * *

387 Q. What did Mr. Tobin say?

A. I don't recall exactly what Mr. Tobin said.

Q. Did Mr. Tobin tell them that his father was out of town?

A. He mentioned something to that effect.

Q. That his father was not there?

388 A. Yes.

Q. Is that right?

A. That's right.

* * * * * * * *

Q. Did Mr. Lunin say anything to Mr. Tobin about a majority or representing a majority of the employees at that time?

A. Yes, he did.

Q. What did Mr. Tobin say about that?

A. Mr. Tobin's reply was something like, How did he know? or something like that.

* * * * * * * *

399 NAT FREEMAN,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * * * * *

420 Q. Was the committee appointed at this meeting?

A. The committee was appointed at this meeting.

Q. To talk with Mr. Dismukes or Mr. Tobin?

A. That's right.

Q. Who was on that committee?

A. Croon, Shannon and I.

* * * * * * * *

421 Q. There was no vote at the Friday meeting?

A. Not at that time.

Q. At any meeting, Tuesday morning or some other time, was a vote taken by a written ballot?

A. On Tuesday morning there was a written ballot taken as to whether we should go out on strike or not.

* * * * * * * *

424 Q. Do you remember anything else that was said during that conversation?

A. Mr. Lunin said that the men refused to go back to work unless he recognized them as union members and himself as bargaining agent, and that they would strike.

* * * * * * *

437 Q. Was there any discussion about guarantee in that matter that Mr. Dismukes was dealing with you about?

A. Yes. Mr. Dismukes told the men to give him several weeks to find out whether those routes will come up to their old figure—he was talking about the extra routes put on—and in the meantime that he would guarantee the men the difference between their new earnings and their old earnings. Now, I don't know what happened with the other men. I know a couple of them complained to me that they got the difference the first week and the second week it was taken out of their pay envelopes; and when I asked Mr. Dismukes what was the idea of that he said, well, it was just a carry-over, a loan or something that the company gave the men to tide them over, because they hadn't earned up to their around forty dollars a week or so. Some of them earned as little as thirty-five and thirty-seven dollars. He gave them—I mean he gave me three dollars that week in my pay envelope, and I told him I'd give it all back to him—that I didn't need that kind of a loan—that I had a lot more money than that.

Q. Mr. Freeman, was that particular thing the subject of some discussions between you and Mr. Carnifax also?

A. That was during the troubles that we were having there.

Q. I mean, did you and Mr. Carnifax talk about that
438 problem you were just complaining about?

A. Yes, we did.

Q. Was that the conversation that you had with Mr. Carnifax that you testified about a little while ago?

A. That's right.

Q. About this—

A. About the fifty-dollar guarantee. That was given to me that way by Mr. Carnifax, and I told Mr. Carnifax I had nothing to do with it.

* * * * * * * *

439 Q. Did you witness any cards that were not filled out in your presence?

A. No.

Q. Every card that you witnessed was filled out in your presence?

A. That's right.

Q. You are sure of that?

A. Positive.

* * * * * * * *

441 Q. Did you fill yours out among the first group?

A. I was the first one to fill the first card out.

Q. You were the first one to fill out the first card?

A. That's right.

Q. Did you date your card when you filled it out?

A. I did.

Q. Mr. Freeman, how do you account for yours being dated the 16th and about five others in there being
442 dated the 10th of August?

A. May I see them?

Q. The cards are right in front of you. I'd be glad to have you look at them.

A. I probably dated mine when I turned it in.

Q. How about those that are dated the 31st of August? When did you date those?

A. I didn't date them so. The men dated them when they gave them to me.

Q. The men dated them when they gave them to you?

A. That's right.

Q. If you got the cards signed within ten days from the time you got them from Mr. Lunin—

A. I say about.

Q. How do you account for the fact that some of the cards are dated the 31st of August?

A. That man must have turned his card in to me when we decided to strike or went out on strike. I don't remember.

Q. You don't remember when these cards were actually signed, do you?

A. I remember when they were signed. They were signed in my presence, and dated.

Q. Each one was dated at the time shown on the card, in your presence on that day?

A. That's right.

* * * * * * * *

452 Q. Yes.

A. And the committee got together with Mr. Lunin and went across the street to see if he was there.

Q. Did you go in the front door?

A. The back gate.

Q. You went in the back gate?

A. Yes.

Q. Did you go inside the building of the plant?

A. No, sir. We met at the gate. I should say we were met at the gate.

Q. You were met at the gate?

A. That's right.

Q. Who met you?

A. Mr. Tobin, and Mr. Dismukes was behind him.

453 Q. Did the conversation take place there at the gate?

A. At the gate.

* * * * * * * *

454 Q. Did Mr. Lunin tell Mr. Tobin that he had a majority of the men?

A. He did.

Q. And Mr. Tobin said he didn't believe it?

A. He didn't believe it.

Q. Is that what Mr. Tobin said?

A. That's right.

* * * * * * * *

Q. You don't recall him saying anything about his father being out of town?

A. We knew he was out of town.

Q. You all knew that he was out of town?

A. Yes.

Q. Did you tell Mr. Lunin that?

A. That's right.

Q. He knew it too?

A. He knew it.

Q. And you knew Mr. A. J. Tobin was the boss?

A. Mr. A. J. Tobin was the man who hired me. I didn't know in what capacity Sherman was acting.

* * * * * * * *

459 Q. One other question. Do you remember whether or not the plant people joined in the strike?

A. They saw us across the street and they came out and joined with us.

* * * * * * * *

460 Q. Did you sign up any plant people in the union?

A. I signed up a couple of them—not all of them.

Q. Did any of the plant people join in your picket line?

A. Yes, a couple of the boys joined, and stayed a couple of days with us, and then disappeared.

* * * * * * * *

469 FRANCIS J. REILLY,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * * * * *

Direct Examination.

* * * * * * * *

483 Q. Was there any discussion about an election at that meeting, that you remember?

A. Yes, sir.

Q. Was anything said about a consent election?

A. Yes, sir. Miss Hopkins asked.

Q. What did she ask?

A. If they would consent to an election to prove whether the boys were in our local union or not.

* * * * * * * *

484 **Cross-Examination.**

* * * * * * * *

488 Q. Would you remember any of their names if I called them off to you?

A. I might.

Q. Do you remember a Mr. Hanna? Irvin Hanna?

A. I don't recall that one.

Q. How about Henry Allen Tripp?

A. I remember Tripp.

489 Q. Was he one of the two men you talked to?

A. I don't remember if he was one of the two men on the sidewalk that I talked to.

Q. Was he one of the men who joined on the day after the strike?

A. I'm pretty sure he was.

Q. You're sure it wasn't the day of the strike, Mr. Reilly?

A. I don't believe it was. I'm pretty sure it was the day after.

Q. We are agreed that the strike happened on the Tuesday after Labor Day in 1948?

A. That's right.

Q. And that would have been September 7, is that right (handing calendar to witness)?

A. That's right.

Q. Mr. Reilly, I show you Mr. Tripp's card, which has been identified as Respondent's Exhibit 2, and ask you to look at the date on that (handing to witness).

A. The seventh.

Q. Which was the day of the strike?

A. That's right.

Q. And I show you a card from Mr. Erving Hanna, which has been identified as Respondent's Exhibit 1 (handing to witness).

A. Yes, sir.

* * * * * *

490 Q. Your local does not have any restriction against taking in people in a plant it represents, does it? All the people in the plant?

A. That is according to the type of plant.

Q. I am talking about a bottling plant, for example.

A. No, sir.

Q. You have no ruling?

A. We have jurisdiction.

Q. There is no reason why you should not take them
491 in if they want to join?

A. That's right.

Q. And they are all right otherwise?

A. That's right.

* * * * * * *

492 Q. The conversation between your group and Mr. Tobin and Mr. Dismukes—where did that take place?

A. I would say approximately twenty-five to thirty feet inside the front door of the plant.

Q. Inside the main building?

A. That's right.

Q. It was not in the back, by the back gate?

A. No, sir.

Q. It was not in the yard?

A. No, sir.

Q. And on the first occasion you did not go in the back gate?

A. No, sir.

493 Q. The conversation was in the main plant?

A. That's right. Through the front door.

* * * * * * *

Q. Had Mr. Lunin or the local union filed a petition with the NLRB for an election?

A. I am pretty sure Mr. Lunin did. If he didn't he was lax on his job, and he is never that.

Q. You're pretty sure he had filed a petition at that time?

A. Yes, sir.

* * * * * * * *

495 A. Say that again.

Q. He said that he wouldn't put the men back to work unless Mr. Tobin agreed to recognize or unless the NLRB sent a man in here to decide the thing?

A. No. Or until.

Q. Or until the NLRB sent a man in here to decide?

A. That's right.

Q. Are you sure that's about what he said?

A. Yes.

Q. What did Mr. Tobin say about that?

A. Mr. Tobin said he didn't believe that we had a majority of his people—he didn't believe we had them organized is what he said.

* * * * * * * *

Q. In other words, he didn't believe in a union of driver-salesmen alone?

A. Exactly.

Q. Is that what he said?

A. That's right.

Q. He did not believe in a union of driver-salesmen alone?

A. That's right.

Q. But he did believe in unions generally in other crafts?

496 A. That's right.

* * * * * * * *

Q. Were you ever present when there was a discussion with Mr. Tobin or Mr. Dismukes to the effect that the old man Tobin was away?

A. No, sir. Not me.

Q. Did you know that he was away?

A. I didn't even know. I thought he was the big chief.

• • • • • • • •

499 Q. Did you or Mr. Freeman have any information, as far as you know, that there had been something filed with the NLRB?

A. Only reports we were getting from John.

Q. Did Mr. Lunin say he had filed something with the NLRB?

A. That's right.

Q. Did he tell you what he had filed with the NLRB?

A. I took it for granted that it was a petition.

• • • • • • • •

511 Q. The alternatives given to the company were to either recognize the union or consent to an election or the boys wouldn't go to work, is that right?

A. We didn't say anything about consenting to an election.

Q. You never did say you would consent to an election?

A. That's right.

Q. Either recognize the union, or what?

A. Wait for the NLRB to reach a decision.

Q. Or wait for the NLRB to reach a decision?

A. That's right.

Q. What did you want the company to do while the NLRB was reaching a decision?

A. Put the men back to work—status quo.

• • • • • • • •

517 Q. Did John at any time say, "Mr. Tobin, the men are ready to go to work here—ready to report to their jobs"?

518 A. No.

• • • • • • • •

519 Q. (By Mr. Constangy) Mr. Reilly, you are an experienced union man. What did that statement of John Lunin's mean to you?

A. It meant that the men weren't going back to work until something was decided by the company.

* * * * * * *

520 Q. Do you remember Mr. Tripp handing you a card, or somebody giving you a card for Mr. Tripp?

A. I just don't remember. Somebody must have given me a card from Mr. Tripp.

Q. Is this an official card of the Teamsters Union (handing to witness)?

A. It is.

Q. Is this an official card of the Teamsters Union (handing to witness)?

A. That's right.

Q. Do you know what the symbol "Pd" with a check mark means?

A. "Paid."

Q. And "Bk" with a check mark?

A. "Book."

Trial Examiner Hunt: Reference is being made to Respondent's Exhibit 1?

Mr. Constangy: To Respondent's Exhibit 1.

* * * * * * *

563 ARTHUR MACK,

a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

* * * * * * *

Direct Examination.

Q. (By Mr. Constangy) Do you work for the Seven Up Bottling Company?

A. Yes, sir.

Q. How long have you worked there?

A. About seven years now.

Q. Were you working for the Seven Up Bottling Company in September of 1948?

A. Yes, sir.

Q. Do you remember a strike taking place at the Seven Up Bottling Company in September of 1948?

A. Yes, sir.

564 Q. Were you at the plant the day of the strike?

A. Yes, sir, I was.

* * * * * * * *

Q. (By Mr. Constangy) Do you remember that it was the day after Labor Day?

A. Yes, that's right.

Q. Was that a Tuesday then?

A. That is correct, sir.

Q. At what time did you go to work that morning?

A. I went in at six-thirty.

Q. You went in at six-thirty?

A. Yes, sir.

Q. You worked at the plant?

A. Yes, sir.

Q. Not the office?

A. That's right. I works in the plant.

Q. Who was there when you got there?

A. There wasn't anyone there.

Q. Did you see anybody come in after you came there?

A. Yes, sir, I did.

Q. Who came to work after you did? Not by name.

565 A. Some of the drivers came in.

* * * * * * * *

Q. Did some of the bottlers come in?

A. Yes, sir.

Q. Some of the loaders?

A. Yes, sir.

Q. Did you see Mr. Carnifax and Mr. Chapman?

A. Yes, sir.

Q. Mr. Dismukes?

A. Yes, I saw all of them when they came in.

Q. Did you at any time during that morning see a Mr. Lunin or a Mr. Reilly? Do you know who they are?

A. Well, yes, sir, I knowed them.

Q. You know them by sight? You know them when you see them?

A. Yes, sir.

Q. Did you ever see Mr. Lunin or Mr. Reilly, either of them, come into the plant that day?

A. Yes, sir, they came in there that morning.

Q. About what time did they come in?

A. Well, it was right around seven o'clock.

Q. What did they do? Did you see what they did when they came in?

566 A. Well, the only thing I saw, I saw them talking to Mr. Dismukes and Mr. Tobin.

Q. Who did you see talking to Mr. Dismukes and Mr. Tobin?

A. Just them two.

Q. Mr. Reilly and Mr. Lunin?

A. Yes, sir.

Q. Were any drivers with them?

A. I only saw them four.

Q. Where were they talking?

A. They were talking nearby to the front—better in the middle of the building.

Q. The main building?

A. Yes, sir.

Q. Where were you?

A. I was standing over there by the machine, just about four or five feet away from them.

* * * * * * * * *

567 Q. Mack, did anybody say anything to you that day about the strike?

A. Yes, sir.

Q. Who said something to you?

A. One of the men, after I punched in after lunch, he called me in.

Q. Who was he? What man?

A. One of the union men that was handling the strike around there.

Q. Are you talking about one of the drivers?

A. No, sir.

Q. Who else was there? What union men were there?

A. There was one of them who was walking around with the drivers.

Q. Was it Mr. Reilly?

A. I guess it was him.

Q. Was it one of the men who came into the plant that morning?

A. Yes, sir.

Q. What did he say to you?

A. He told me that he had got all the plant help to come out on a strike and told me to come out with them—that I shouldn't stay in there.

Q. What did you tell him?

A. I didn't give him any satisfaction. I just walked
568 on. I said, "I'll see," and I walked on. I had just punched in and I got to work.

Q. When you were out to lunch that day, did you hear any discussion or conversation between any of the plant help and anybody—Mr. Reilly, Mr. Lunin, or any of the people on strike?

A. No, sir, I didn't hear anything, because he had them out on the street and I was sitting up by the plant, eating.

Q. Who had who?

A. The plant help. They had met for lunch, and he got them all.

Q. Who is he?

A. One of those men.

Q. The same man that talked to you?

A. Yes, sir. The same one that talked to me.

Q. Was he talking to them at that time?

A. Yes, sir.

Q. Did the plant people come back to work that day after lunch?

A. They came in there and told the boss that they would empty the soaker out for him, and then they were going out on strike; so they emptied the soaker and then after that they walked out.

Q. Which boss did they tell that to?

A. The plant foreman.

Q. Was it Mr. Cohen?

569 A. Yes, sir, Mr. Cohen.

* * * * * * * *

570 Q. Is a two motor a motorized vehicle that you carry cases of Seven-Up on?

A. Yes, sir. That's what it is.

Q. Is it moved around in the plant?

A. Yes, sir.

Q. Do the men operate it in the plant?

A. Yes, sir.

Q. All right, Mack. What else did you do?

A. Well, that's about the biggest thing I does.

Q. Do you ever help with the loading or unloading of the trucks?

A. Yes, sir, I have.

* * * * * * * *

571 Q. The men who run the bottling machines—the people who run the bottling machines. Do they ever help in loading and unloading?

A. Sometimes.

* * * * * * * *

Cross-Examination.

* * * * * * * *

575 Q. What about these five men who walked out that day? Did they come back to work?

A. No, sir. Wait. Oh, yes. Some of them came back.

Q. How soon after the first day?

A. I don't know, sir. About a week, I imagine.

Q. About a week later they came back?

A. I believe so.

Q. Did the plant run the rest of that first week?

A. Yes, sir.

Q. It did?

A. Yes, sir.

Q. Did new men come in?

A. Yes, sir, they had some new men.

Q. Did they hire enough new men to start running the plant immediately?

A. Yes, sir.

* * * * * * * *

576 WILLIAM J. TREACY,

a witness called by and on behalf of the Company,
577 being first duly sworn, was examined and testified as follows:

* * * * * * * *

579 Q. Was the strike in progress when you came to work?

A. Yes, sir.

Q. At what time did you come to work?

A. Around eight-thirty.

Q. Around eight-thirty?

580 A. Yes.

* * * * * * * *

Q. Did you ever have any conversation, that day or thereafter, with Mr. Reilly?

A. Yes, sir, at noontime.

Q. Tell us what that conversation was.

A. Well, about twelve-thirty, coming back from lunch, he had all the plant help out there at the corner of the building, asking them why they don't come out with the other boys, and that he was going to get them a dollar an hour if they'd join the union.

Q. What else was said?

A. They all agreed to go out, so everybody went out. We went back in and took the bottles out of the ma-
581 chine, and punched out.

* * * * * * * *

Q. Did you go out on strike with them?

A. That's right.

Q. Did you picket at any time during that strike?

A. Yes. For about an hour only.

Q. What did you do the rest of the time, Mr. Treacy? Did you stay around the plant?

A. I sat across the street in a car.

Q. Did you go to work after the strike?

A. That's right.

Q. When did you go back to work?

A. I believe it was the following Monday.

Q. How did you come to go back to work? What was the occasion of your going back to work?

A. I went down to get my pay on Friday and asked them if they'd take the boys back. The boys that worked in the plant asked them if they wanted to go back to work.

Q. Whom did you ask?

A. I asked Mr. Tobin.

582 Q. What did he say?

A. He said, "Sure, if you want to."

Q. He said, "Sure, if you want to"?

* * * * * * * *

Q. (By Mr. Constangy) When you say "We all went back to work," who is "we"?

A. Me, Henry Tripp, Bobbe.

* * * * * * * *

Q. Did you tell the other plant men anything about your conversation with Mr. Tobin?

A. No, sir, I just told them that I asked if I could go back to work, and he said it was all right—if anybody else wanted to come back to work they were welcome to come in Monday. So I told them what he said.

583 Q. Was that the only conversation you had with Mr. Tobin and Mr. Dismukes during the strike?

A. That's right.

Q. And that happened on Friday, the day you got your

A. That's right.

Q. And you had picketed at least an hour?

A. About an hour.

* * * * * * * *

590 Q. Now, exactly what did you hear Mr. Reilly say to these men after he got there?

A. He had already been talking to them. He asked me if I had gone out on strike. I said, "For what?" He said he had told them he'd get them a dollar an hour if they came out with the rest of the fellows.

Q. That is what you heard him say?

A. Yes.

Q. You liked that idea?

A. I didn't like the idea. That's what I heard him say.

Q. But you liked the idea of more money?

A. Sure. Don't you like the idea of more money? I do. Anybody likes it.

Q. And you decided to go out with him?

A. That's right.

Q. And he also asked you to sign a union card?

A. He gave everybody a card.

Q. Did he give you one?

A. Yes.

591 Q. You didn't sign it?

A. I don't remember. He gave them to everyone sitting in the car.

* * * * * * * *

Q. And did everybody who had worked in the plant go back to work the following Monday?

A. Everybody but one.

Q. Who was he?

A. Clyde Newman.

* * * * * * * *

592 CHARLES H. CARNIFAX,

a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

* * * * * * * *

Direct Examination.

* * * * * * * *

Q. What is your position with them?

593 A. At present I am route supervisor.

* * * * * * * *

595 Q. Did you have a conversation with Mr. Freeman on the fourth day of September or thereabouts, in which the union or the strike was discussed?

A. No, sir. There was no strike at that time.

Q. Well, did you have any conversation with Mr. Freeman about a strike or about a union or about any matter in connection with joining a union?

A. On that particular day, after he came in off his route that evening.

Q. What day was that?

A. That was in the afternoon—Saturday afternoon. I think that was the 4th of September, if I am not mistaken.

Q. It was the same afternoon before Labor Day?

A. That is correct.

Q. All right, sir.

A. And I told him that I would like to see him before he left. We went just outside the yard there, and I told him that I had had a talk with Mr. Sherman Tobin that morning, and that the fifty-dollar guarantee that the boys wanted, Mr. Tobin had no authority to give—that he must see his father in order to get it authorized.

* * * * * * * *

598 Q. Mr. Carnifax, did you have a conversation with Mr. Freeman several days after the strike was under way, while the men were on strike? Did you have any con-

versation with him at a service station or some place near the plant, where you were filling a dispensing machine?

A. That is right. The company owns some vendors
599 and I went in there to service this particular one.

Mr. Freeman and possibly one other, possibly two other men, came up. Mr. Freeman asked me what I was doing—was I going to sell the thirty or forty cases I had on the truck? I told him I was servicing the vendors. Of course, they had been going around and stopping sales or any attempts to sell anything; but these vendors were company-owned, so they knew that they couldn't very well get away from that—I mean get away with that.

Q. Was there any discussion between you and Mr. Freeman or any other persons present about whether you were for or against the union on that occasion?

A. None whatever that I can remember.

Q. Was there any discussion as to whether or not they wanted to come back? Did they ask you could they come back?

A. No, sir. There was none. They knew I had no authority to take them back, anyway.

Q. Did anyone ask you to talk to Mr. Tobin about taking them back?

A. No, sir.

Q. Not Mr. Freeman?

A. No, sir.

Q. Or anyone else?

A. No one at all.

Q. All right. Now, Mr. Carnifax, you were in the plant the morning of the strike, weren't you?

600 A. That is true.

Q. Did you witness any of the conferences or conversations that took place that morning between the union officials and the company officials?

A. I witnessed the conference that the two union men, Mr. Lunin and Mr. Reilly, had with Mr. Sherman Tobin and Mr. Dismukes.

Q. In what way did you witness it?

A. I was at the back end of the plant while they met—rather in the center of the plant.

Q. Did you overhear any of the conversation?

A. Not a word.

Q. Did you see who was there?

A. I did.

Q. Who was there?

A. The four gentlemen: Mr. Sherman Tobin, Mr. Reilly, Mr. Lunin and Mr. Dismukes.

Q. Did you see Mr. Freeman?

A. Not in that conference.

Q. Mr. Croon?

A. Not in that conference.

Q. Mr. Shannon?

A. Not in that conference.

Q. Mr. Klein?

A. Mr. Klein was not there.

* * * * * * *

605 Q. Now, Mr. Carnifax, I will ask you specifically, during the period of the strike or between Tuesday, when the strike started, and on the Monday following, when you started your trucks rolling, did any employee make application to you for a job or request you to convey his application to Mr. Tobin or Mr. Dismukes?

A. None whatsoever.

Q. No employee made any request or application to you for his job?

A. No, sir.

Q. Now, Mr. Carnifax, I will ask you specifically whether or not on September 4, 1948, or at any other time, you threatened or warned any employee or any group of employees to refrain from becoming members or staying members of the union?

606 A. Nothing, in any way, shape, manner, or form.

Q. Now, I will ask you whether or not on August 15, 1948, or September 4, 1948, or at any other time, you ever

offered employees or any employee wages or increases or other benefits on the condition that that employee refrain from assisting or becoming or remaining a member of a union.

A. I had absolutely no authority to do so. I had absolutely no authority to say any such thing.

Q. Well, did you do that, whether you had authority to do it or not?

A. No, sir, I did not.

* * * * * * *

Cross-Examination.

* * * * * * *

610 Q. What did Mr. Tobin say, if anything, about the possible strike, when you talked to him on September 4?

A. He never said anything about the strike.

Q. What did he tell you on that occasion?

611 A. He said, "We discussed only the fifty dollar angle of it."

Q. What did he say about that?

A. He said he would have to get authorization of that from his father.

* * * * * * *

615 **Redirect Examination.**

* * * * * * *

Q. How long have you known Mr. Sherman Tobin?

A. Twelve and a half years, approximately—as long as I have worked for the company.

Q. He was a rather small boy when you first came there?

A. He was.

Q. Do you remember whether or not Mr. A. J. Tobin was available or was in town during this period of August-September, 1948?

A. Mr. A. J. Tobin was in New York at that time, as I understand it—very ill.

* * * * * * *

617 Q. Did you say anything to Mr. Freeman about Mr. Tobin, Sr., being away?

A. I didn't have to tell him. He was well aware of the fact, I am sure.

Q. You mentioned that Mr. Sherman Tobin told you he couldn't do it without clearing with his father.

A. That's right. And it was common knowledge that Mr. A. J. Tobin was away.

* * * * * * * *

618 CHARLES MASON DISMUKES,

a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

* * * * * * * *

Direct Examination.

* * * * * * * *

Q. Who hired you, Mr. Dismukes?

A. Mr. A. J. Tobin.

619 Q. To whom do you report?

A. Mr. A. J. Tobin.

* * * * * * * *

620 Q. Mr. Dismukes, was there anybody with Mr. Reilly and Mr. Lunin, other than those two gentlemen, when you first talked to them?

A. No, sir, I saw only the two gentlemen.

Q. Do you know Mr. Nat Freeman?

621 A. Yes, I do.

Q. Was he with them?

A. No.

Q. Was Mr. Croon with them?

A. No.

Q. You will have to speak up a little louder, please.

A. No. Mr. Croon was not with them.

Q. Was Mr. Shannon with them?

A. No.

Q. Was Mr. Klein with them?

A. No, Mr. Klein was not with them either.

* * * * * * * *

622 Q. What happened when Mr. Tobin got there?

A. Mr. Tobin came in the rear of the plant and I met him there. I said, "There's a couple of gentlemen up here to see us," so Mr. Tobin and I, together, walked up to the middle of the plant and met Mr. Lunin and Mr. Reilly.

Q. Did Mr. Lunin and Mr. Reilly come back in when Mr. Tobin came in?

A. They evidently were already in.

Q. And you saw them about the same time you saw Mr. Tobin?

A. Yes. They met us in the middle of the floor of the plant.

Q. Now, you and Mr. Tobin went up to the middle of the plant and Mr. Lunin and Mr. Reilly came toward the middle of the plant?

A. That is correct.

Q. Was anybody accompanying Mr. Lunin and Mr. Reilly?

A. No, there was no one accompanying them.

Q. Was Mr. Freeman there?

A. Mr. Freeman was not there.

Q. Was Mr. Shannon there?

A. Not there.

Q. Was Mr. Croon there?

A. Not there.

623 Q. Was Mr. Klein there?

A. Mr. Klein was not there.

Q. Was anybody there but you and Mr. Tobin and Mr. Lunin and Mr. Reilly?

A. So far as I know, only the four people: Mr. Lunin, Mr. Reilly, Mr. Tobin and myself.

Q. Is there anything significant to your statement as

far as you know, or does that mean there wasn't anyone else there?

A. There wasn't anybody else there.

Q. What took place in that conversation, Mr. Dismukes? Tell me who said what, and what reply was made by anybody else.

A. Mr. Lunin asked Mr. Tobin to recognize his union, and Mr. Tobin stated—rather Mr. Lunin said that he had a majority of his men out, and Mr. Tobin said he didn't believe he had a majority, and, anyway, he had no authority to recognize any union, as his father was out of town. That's about all.

Q. What did Mr. Lunin say?

A. I believe Mr. Lunin had made some statement that—well, he made some recommendations that his union was easy to get along with and he gave him a list of recommendations of places that were organized in the Miami area.

Q. Do you remember—

A. That's about all I remember him saying. After that it seemed to break up and he left.

Q. Do you remember any of the places that were named?

624 A. Land of Sun Dairy is one that I recall, and he named some gentleman at the head of Land of Sun Dairy as reference with respect to his union.

Q. All right. Now, Mr. Dismukes, is that everything that transpired in that conversation, as far as you know?

A. As far as I know, that's all.

Q. Was anything said in that conversation by Mr. Reilly or Mr. Lunin about the National Labor Relations Board, or waiting for a determination by the Board, or being bound by the Board, or anything in connection with it?

A. Not to my knowledge. I don't remember anything like that.

Q. How long did that conversation last?

A. I would say it was a matter of ten minutes.

Q. Ten minutes?

A. Yes, that's about all.

Q. Did anybody say anything about a union—in this conversation—not being the right thing for driver-salesmen, but that unions were for bricklayers, carpenters, electricians, and the like?

A. Not to my knowledge. No one said anything of that nature.

Q. Did Mr. Tobin say that in that conversation?

A. No, sir.

Q. Did you say that in that conversation?

625 A. No, I did not.

* * * * * * * *

Q. All right. Now, Mr. Dismukes, did you there-
626 after, right after that first conversation, during the week of the strike, have any other conversation with Mr. Reilly or Mr. Tobin, Mr. Freeman, Mr. Croon, Mr. Shannon and Mr. Klein?

A. I had only—

Q. Pardon me. I meant Mr. Lunin.

A. I had no conversation with Mr. Reilly, Mr. Lunin, Mr. Klein or—who else did you name?

Q. Mr. Shannon?

A. Mr. Shannon.

Q. Mr. Freeman?

A. Mr. Freeman.

Q. Mr. Klein?

A. Mr. Klein.

Q. Mr. Croon?

A. Mr. Croon.

Q. Mr. Lunin?

A. Mr. Lunin. I believe I mentioned him.

Q. All right. Now, then, let me ask you specifically, Mr. Dismukes, if within two or three days after the beginning of the strike Mr. Reilly, Mr. Croon, Mr. Freeman and Mr. Shannon came inside of the front door and said something

to you about putting the boys back to work pending an NLRB decision?

A. No. These men didn't say anything to me about that.

Q. Did Mr. Freeman ever ask you during that period if you thought Mr. Tobin would put the men back to
627 work pending a decision of the NLRB?

• • • • • • • •

628 Q. What else was said in that conversation in your presence?

A. I believe Mr. Lunin stated that he wanted Mr. Tobin to sign a recognition of the union—sign something—I don't remember what he wanted him to sign—and he would put his men back to work.

Q. Did Mr. Tobin reply to that?

A. Mr. Tobin replied that his father was still out of town and he had no authority to recognize any union.

Q. Was that after or before the trucks were on the street?

A. After the trucks were on the street.

Q. After the trucks were on the street?

A. That's right.

Trial Examiner Hunt: Was Mr. Tobin present at this time?

Mr. Constangy: All right, sir.

Q. (By Mr. Constangy) This conversation was between Mr. Lunin, Mr. Tobin and yourself in Mr. Tobin's office?

A. That's right.

Q. Did Mr. Tobin say anything about the jobs being filled?

A. Yes, he told Mr. Lunin that all the jobs had been filled.

Q. And he did not have any authority to sign any recognition agreement until his father came back?

629 A. That is correct.

• • • • • • • •

Q. All right. Now, Mr. Dismukes, did you have a conversation at the rear gate of the plant in which Mr. Reilly—

now this is during the week of the strike—in which Mr. Reilly, Mr. Freeman, Mr. Klein and Mr. Shannon were present, when any of the men asked you about going back to—going back to work?. Where any of the strikers asked you or said anything to you about wanting to go back to work?

A. I didn't have a conversation with any of those gentlemen at all.

Q. Were you present when they were talking to you?

A. No.

Q. Did you at any time say this: "I am sorry, but the company is dead set against a union"?

A. I did not say anything like that.

630 Q. You never said that to any of your employees at any time?

A. I never have said anything like that.

Q. Did any of the employees during the first week of the strike make any application to you for re-employment, Mr. Dismukes?

A. No. No one made any application to me for re-employment the week of the strike.

Q. Did anyone say anything to you about coming back to work, whether they made a formal application or not, during the first week of the strike?

* * * * * * *

Q. Now, Mr. Dismukes, before the strike or after the strike, did you at any time threaten or warn or ask

631 or urge in any way any of your employees to join or not to join, or to get in or get out of the union in any way?

A. No, I didn't discuss anything like that.

Q. Did you have any discussions on September 7 or 9 about the union?

A. No.

Q. With any of your employees?

A. No.

Q. All right. Now, Mr. Dismukes, I will ask you spe-

cifically whether or not on September 9—that is, two days after the strike began—Nat Freeman, T. Shannon, Walter Croon and Francis Reilly made application for reinstatement to you on behalf of all of the employees who were on strike.

A. No, they did not.

Q. I will ask you if at any other time those gentlemen made application to you for themselves or on behalf of the others?

A. No.

Q. I will ask you whether or not on September 10, which was the next day following—let's see, the 7th was Tuesday, the 8th was Wednesday—on Friday of the week of the strike, Nat Freeman, Croon, Klein, Shannon or Reilly made application to you on behalf of all the employees listed—all the strikers or any of the strikers?

A. No, they did not.

Q. Did they do that at any time?

632 A. No.

* * * * * * *

633 Q. Do you remember Mr. Nat Freeman coming in there while you were paying off the employees?

A. Yes, I remember Mr. Freeman coming in.

Q. Did you hear Mr. Freeman ask you or Mr. Tobin something that sounds like "What's gonna be"?

A. No.

Q. Did he say anything to you about would you take the men back?

A. No, he did not.

Q. Did he say anything to you when he came to get the pay?

A. A possible "Thank you."

Q. Any other conversation other than a perfunctory "Thank you"?

A. That's all.

Q. Were you and Mr. Tobin together all the time during the paying off of the employees?

A. All the time we were together, during the entire operation.

* * * * * * * *

634 Q. What conversation did you have with the supervisors?

A. Just rumors, more or less.

Q. Rumors?

A. Rumors of a pending, possible strike.

Q. A pending, possible strike?

A. A possible strike. They had heard rumors of a strike.

Q. Did you ask any employee or any supervisor whether any employee was a member of a union or not?

A. No.

Q. Did you make any attempt to find out?

A. No, I did not.

* * * * * * * *

635 Q. Do the driver-salesmen have any contact with the mechanic?

A. Yes. At times the driver may have some trouble on the road, and he will call in to our office at 1655 North Miami Avenue, stating his trouble, and the mechanic goes out, meets him on the road, and will service his truck. If he is broken down, he'll pull it in; if he can fix it there, he does that.

Q. Does the mechanic ever come to the plant?

A. Oh, yes, at the plant, three or four times a day.

Q. Does he fix trucks at the plant as well as at the garage?

A. Oh, yes, he fixes trucks at the plant and the garage. Minor repairs are done at the plant, and major repairs are done in the warehouse office and garage, you might call it.

Q. Now, Mr. Dismukes, what does the advertising man do?

A. The advertising man is responsible for the placing of outside signs—that is, metal signs. He goes out and works the route like a salesman—goes from dealer to dealer placing his signs.

Q. Does he have any contact with the salesmen?

A. Yes, he does.

Q. Does he make suggestions?

A. Yes, he works very closely to the salesmen.

* * * * * * *

636 Q. (By Mr. Constangy) Mr. Dismukes, does the advertising man make suggestions to the salesman, or do they make suggestions to him in any way?

A. The salesmen make suggestions to the advertising man. The salesman gets a request for a certain piece of advertising from a dealer, and he will bring it in and discuss it with the advertising man, and between the two of them, something will be done about getting a piece of advertising—point of purchase advertising—outside advertising—with the dealer.

Q. Does the salesman put up any advertising material?

A. Yes, the salesman is responsible for the inside advertising.

637 Q. Various Seven-Up signs?

A. Yes. Inside advertising.

Q. And the advertising man puts them outside of the dealers' establishments?

A. That's right.

Q. What does the refrigeration man do?

A. The refrigeration man is a mechanic. He maintains and services the Seven-Up cooling equipment. This consists of coolers and vendors.

Q. Does he have a route? Where does he work?

A. No, he works in all territories in the franchise. What I mean by that is that we have twelve routes.

Q. Does he work in the customer's place of business or in your place of business?

A. Both. He works in the dealer's place of business and in the plant.

Q. Does he ever get calls or requests from the salesmen?

A. The salesmen call in. For instance, the way it works is like this: A salesman is servicing a dealer, and while

he is in there he finds that the Seven-Up cooler or vendor is on the blink, and he calls our office at 1655 North Miami Avenue, and they in turn send a service man or refrigeration mechanic out to this dealer, and he fixes the cooler or vendor, as the case may be.

* * * * * * * *

643 Q. (By Mr. Constangy) Mr. Dismukes, I think you have already told us, but just to keep the record straight, will you please explain what the advertising man does?

A. The advertising man is a salesman who is responsible for the placing of outside point of purchase metal signs for the company.

Q. Are those signs placed at the places near or adjacent to your customers' places of business?

A. That is correct.

Q. What is the purpose of those signs, Mr. Dismukes?

A. The purpose of those signs is to lead the consumer in to drink Seven-Up.

Q. To use my words, to stimulate sales?

A. That is right. "Motivate" is the word.

Q. Do they have any purpose other than the signs you try to get the drivers to put up inside the store?

A. The same purpose. All to motivate sales.

644 Q. What does the refrigerator man do?

A. The refrigerator mechanic is responsible for the servicing and maintenance of Seven-Up coolers and vendors.

Q. When you refer to "vendors" you are talking about a machine, not a salesman?

A. That is correct. It is a nickel vending machine.

Q. Where are they placed?

A. In dealer outlets, service stations.

Q. Anywhere else?

A. Super markets.

Q. Who services the machines?

A. The salesman.

Q. The driver-salesman?

A. The driver-salesman, yes. The refrigerator mechanic services merchandise too.

Q. Is there any contact between driver-salesmen and the refrigerator man?

A. Oh, yes. The driver-salesman can be servicing an outlet and find that his refrigeration there is not working properly, so he calls in the office and gets hold of the refrigeration mechanic and has him come out to service the machine or the cooler or the vendor.

Q. Is it necessary that these machines be serviced in order to keep the sales of the drivers up?

A. Absolutely. If they weren't working, we
645 wouldn't be selling any merchandise.

* * * * * * * *

646 Q. Now, Mr. Dismukes, do the plant help have any connection with the work of the salesmen other than manufacturing the product?

A. Yes. Plant help—well, at times we take all the plant help out for loading and unloading trucks—that is done from time to time.

Q. Under whose direction do they do that? How does that happen?

A. That is done under my direction.

Q. Do you have the authority or have you ever told the bottlers?

A. Yes, I have the authority.

Q. Have you ever told a bottling machine operator to come out here and load the truck?

647 A. Yes, I have authority to do that.

* * * * * * * *

Q. Do the driver-salesmen work in and out of the same plant that the bottling help works?

A. Yes, the driver-salesmen do work in and out of the plant, that is correct.

* * * * * * * *

655 Q. (By Mr. Constangy) Now, Mr. Dismukes, there is one conversation that was testified about that I did not cover in my direct examination, which I would like to ask you about and then I am through. Did you

656 ever have a conversation with an employee named Nat Freeman in which you discussed with him any previous effort to organize the Seven Up Bottling Company?

A. No, I never had any conversation with Mr. Freeman of that nature.

Q. To your knowledge, and during the period that you had been working there, had there ever been an effort to organize the Seven Up Bottling Company?

A. To my knowledge there never had been.

Q. Have you ever had any information from Mr. Tobin, Sr., as to whether there had ever been an effort to organize the Seven Up Bottling Company?

A. No, I never had any such information.

Q. I will ask you specifically if you had a conversation with Mr. Nat Freeman one time when he was turning in his money, or at any other time, in which you stated to him that men had tried to organize this plant before?

A. No, I didn't have any such conversation with Mr. Nat Freeman.

Q. Did you say to Mr. Freeman these words or any similar words, that "They—" speaking of the company "—wouldn't allow a union here"?

A. No, I never did.

Q. Did you tell him that they had tried to organize the plant before and the company wouldn't allow a union here, and the same thing would happen again?

657 A. No, I never did make such a statement as that. To my knowledge, there never has been any attempt at organizing the Seven Up Bottling Company.

Q. Did you tell him that Mr. Tobin wouldn't allow any such thing to happen in the plant if he found it out?

A. No.

Q. Did you ever tell Mr. Freeman that you thought a union would help business.

A. No, I don't believe I ever told Mr. Freeman that a union would help business.

Q. Did you tell him you thought it would help business but that you personally couldn't go along with it?

A. No, sir.

Q. Did you have a conversation with Mr. Freeman in which any part of such a statement was made?

A. No, sir.

Q. By either one of you?

A. No, sir.

Q. Did you ever have a conversation with Mr. Freeman about unions at any time?

A. No, I never had any conversation with Mr. Freeman about unions at any time.

* * * * * * *

658 **Cross-Examination.**

* * * * * * *

662 Q. Who was in charge of the business actively during that time?

A. Well, this business operates in this manner: I
663 will answer your question like this: I was in charge of seeing that the policy of sales was carried on, and under my direction the plant foreman carried on as a production man. It is a matter of everybody carrying out a policy. You might say that Mr. Sherman Tobin, Mr. Dave Cohen and myself were in charge.

Q. Who is Dave Cohen?

A. The plant foreman.

Q. You did the same thing that you always did, is that correct?

A. That is correct.

* * * * * * *

Q. Did anyone have more responsibility than usual during Mr. A. J. Tobin's absence?

A. I would say no.

Q. Everybody continued to do the same thing?

A. Everybody continued on in the routine carrying out of the laid-down policy, you might say. Everybody carried out the policy made by Mr. A. J. Tobin, and it ran on wheels right along.

* * * * * * * *

664 Q. Mr. Sherman Tobin never did tell you that he couldn't recognize a union as long as his father was out of town, did he?

A. Yes, he did tell me that.

Q. When did he tell you that?

A. No, he didn't tell that to me. He told that in the presence of Mr. Lunin and Mr. Reilly on the morning of the strike.

Q. But you were present?

A. I was present at the time. That's where that was.

Q. He made that statement to Mr. Lunin and Mr. Reilly?

A. Mr. Lunin and Mr. Reilly? I guess you'd say he made it to Mr. Lunin. Mr. Reilly didn't have much to say that morning. Mr. Lunin was doing the talking, and Mr. Sherman Tobin was talking.

Q. And that statement was made?

A. That statement was made.

* * * * * * * *

665 Q. Did you know at that time how soon his father was to return to Miami?

A. No, I did not know. I didn't know until the day he walked in the plant, sometime the latter part of September.

Q. Do you know whether Mr. Sherman Tobin knew at that time or not?

A. I do not know.

Q. If he did, he hadn't said so?

A. That is correct. He hadn't said so to me.

Q. After the strike started, did Mr. Sherman Tobin ever

state to you whether he would or would not recognize the union?

A. No, he never did state that to me.

666 Q. Did he say whether or not he doubted that the union had a majority?

A. He made a statement of that nature the morning of the strike to Mr. Lunin. Mr. Lunin made the statement that he had a majority of the men—"your men" I believe is the way he put it—and Mr. Tobin told him he didn't believe it.

. . . . . .

668 Q. When did you first hear from Mr. Dismukes that there was going to be a strike?

A. September 7, 1948.

Q. You did not know anything about it before that time?

A. No, not for sure. No facts; just rumors.

Q. You had already heard rumors?

A. Rumors is all.

Q. When did you first hear rumors that there would be?

A. The week before the strike, I think it was. It's hard to place any time on it exactly. It was the week before the strike.

Q. At that time did you have any conversations with Mr. Sherman Tobin about restoring the fifty dollar guarantee for the sales drivers?

A. No, I had no conversation like that with him.

Q. That just wasn't discussed at all?

A. No.

Q. Between you and Mr. Tobin?

A. No. Any business of that nature I would take up with Mr. A. J. Tobin.

. . . . . .

672 A. As a matter of fact, it was understood that we would take them back.

Q. How was it understood?

A. Well, it was just—well, frankly, we would have

given anything if they had come back. We were willing to take any of them back. Friday morning we were paying off even after hiring four more men. We let them in the office one at a time so they would have a chance to tell us whether they would come back to work.

Q. But you had no conversations with Mr. Tobin?

A. I don't recall any conversation.

Q. As to whether you would take them back?

A. No. It was just understood. We certainly did not want our men out. We wanted to sell 7-Up, and we wanted the men on the job. We were hoping that they would come back.

Q. Did you give any instructions to the employment agencies as to whether you wanted union men or not?

A. No, I did not give any instructions as to whether I would or would not.

Q. Did Mr. Sherman Tobin tell you at any time during the first week or two after the strike started that either Mr. Lunin or someone else asked him to take the men back?

A. I was present between Tuesday and Thursday of
673 the week of September 13—that is, the next week after the strike—when Mr. Lunin came in to Mr. Tobin's office and told Mr. Tobin words to this effect, something like this—that he wanted to call the strike off if we would recognize his union and he would put the men back to work.

Q. That was in the week following the beginning of the strike?

A. The next week, that is correct.

Q. Other than that you knew of no conversation between Mr. Sherman Tobin and either Mr. Lunin or anyone else about returning the men to work?

A. No.

* * * * * * * *

676 CLIFFORD HOLMES VOIGHT,

a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

* * * * * * * *

678 Q. I hand you a card that has been introduced in evidence as General Counsel's Exhibit 13, and ask you if that is your application for membership in the Teamsters' Union (handing to witness).

A. Yes, sir.

Q. Do you remember the circumstances of your getting and filling out that card, Mr. Voight?

A. I received this card.

Q. Speak up, please.

A. I received this card from Nat.

Trial Examiner Hunt: Nat Freeman?

The Witness: Nat Freeman. That's right. I had it in my truck. It was in there possibly two weeks—or a week at least—and he asked me if I had filled it out, because he wanted it back. He asked for the card back. I hadn't filled it out, so I filled it out and handed it back to him.

Q. (By Mr. Constangy) Was he present when you filled it out?

A. No, sir.

Q. Did he see you fill it out?

679 A. He couldn't have. I filled it out in my truck, on my route, I remember.

Q. How long after you filled it out did you actually give it to Mr. Freeman?

A. The night when I brought my truck in—that night I gave it to Mr. Freeman.

Q. So that Mr. Freeman was not standing at or near you where he could see you fill in any of the entries on that card?

A. No, sir.

* * * * * * * *

683 **Cross-Examination.**

* * * * * * *

686 Q. After the strike started, you decided it was not the right thing?

A. That's right.

Q. Did any of the people who worked in the plant go on strike too?

A. Plant employees?

Q. Yes.

A. After the strike had started, yes, sir.

Q. Approximately how long after it started?

A. It was that afternoon, I think. It was after lunch.

Q. After lunch the first day?

A. Yes.

* * * * * * *

687 Q. They went back the same day that you went back to work?

A. That's right.

Q. So far as you know?

A. That's right.

* * * * * * *

688 Q. (By Mr. Constangy) Mr. Voight, look at the date on General Counsel's Exhibit 13, and see if the date thereon is in your handwriting (handing to witness).

A. That is not my handwriting.

Q. That is not your handwriting?

A. That is not. Definitely not.

Q. The date appearing on that card, 8-10-48, is not your handwriting?

A. No, sir.

Q. Now, Mr. Voight, I hand you an application form that has been identified as Respondent's Exhibit 4 (handing to witness). I ask you to look at that and tell me if that is your original application for a job with the Seven Up Bottling Company.

A. Yes, it is.

Q. That is your original application?

A. That is my original application.

Q. Did you fill that out?

A. Yes, I did, sir.

Q. Can you tell us the date you filled that out?

A. Not the exact date.

Q. Can you tell me, by looking at it, the date you filled it out?

A. August the 14th.

Q. Is this your handwriting?

689 A. That's mine.

Q. That August 14 which appears on the first page of Respondent's Exhibit 4 is your handwriting?

A. That's right.

Q. Did you go to work before or after you filled this application out, Mr. Voight?

A. It was about five days after.

Q. Five days after?

A. That's right.

Q. As a matter of fact you went to work on August 19, is that right?

A. Somewhere about that time.

Q. As of August 19 you had not made an application to the Teamsters' Union, is that right?

A. That's right.

Q. How long after August 19 was it before you made such an application?

A. It wasn't until the route that I was to have was given to me. I was training for it.

Q. That was sometime in September?

A. That's right. Five days before that I was riding with Charlie Nelson at Lauderdale, so it must have been at least a week.

* * * * * * *

691 Q. Did Mr. Freeman sign that in your presence?

A. No, he didn't.

Q. You just gave the card back to him?

A. That's right.

Q. When he gave it to you it was completely blank?

A. That's right, sir.

Q. The date was not on it at all when he gave it to you?

A. No.

Q. And when you returned it to him there was no date on it?

A. Not that I recall. No, this was a blank card.

Q. When he gave it to you?

A. That is correct.

* * * * * * * *

694 SHERMAN TOBIN,

a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

* * * * * * * *

Direct Examination.

* * * * * * * *

699 Q. Now, Mr. Tobin, will you tell us whether or not your father left any instructions or directions or assigned any duties or special authority upon his leaving town to you or to Mr. Dismukes or to anyone else?

A. All my father said when he left was to keep the business running as it had been.

Q. To keep the business running as it had been?

A. Yes.

Q. Did he designate anybody particularly in charge of the business?

A. No, he didn't.

Q. What duties and functions did you perform in your father's absence?

A. I was just keeping things running the way he had left them. I was mainly in charge of the office.

700 Q. You were mainly in charge of the office?

A. Yes.

Q. Who was in charge of the plant?

A. Mr. Dismukes.

Q. Mr. Dismukes was in charge of the plant?

A. Yes.

Q. What was the relationship, if any, between Mr. Dismukes and the man designated as plant manager?

A. Mr. Cohen's only duty was to keep the machinery in the plant running, and turn out the merchandise.

Q. Was Mr. Dismukes his superior?

A. Yes, Mr. Dismukes could give him instructions.

Q. Mr. Tobin, I notice on these pay roll sheets that Mr. Cohen's rate is $100 a week, and Mr. Dismukes' is $80 a week. Does that represent the entire compensation of these two men?

A. No, it does not. Mr. Dismukes received a bonus at the end of the year, and Mr. Cohen was a recent employee.

Q. Did Mr. Dismukes receive a higher compensation than Mr. Cohen?

A. Yes, he did.

Q. And did he have superior authority?

A. Yes, he did.

Q. Insofar as the operation was concerned, when your father was in town who was in charge of the plant—the building separate from the office?

701 A. Mr. Dismukes was.

Q. To whom did he report?

A. Mr. Dismukes reported to Mr. A. J. Tobin.

Q. And your functions, were they largely functions at the other place—the office? The garage?

A. Mainly at the office, in relation to the mechanic and the office employees.

Q. What particular branch of the business operations do you devote yourself to generally?

A. Mainly to recording the records in the office.

Q. As a matter of fact you are a graduate accountant, are you not?

A. I am an accountant—not graduate.

Q. I mean you studied accounting?

A. Four years of accounting.

Q. At Ohio State?

A. That is correct.

Q. And your principal function is in connection with the books and records of the company?

A. Yes, it is.

Q. Now, Mr. Tobin, you have been present here during this hearing and you have heard some testimony as to some communications to you from Mr. Lunin in August of 1948. I will ask you if you remember what was the first occasion that you either met or heard from or talked to Mr. Lunin—Mr. John Lunin?

702 A. The first time I had ever heard of Mr. Lunin was a letter I received from him about the 19th of August, I believe.

* * * * * * *

703 Q. Where did the conversation take place?

A. It took place in the private office.

Q. When you say in the private office, there is just one private office in the general office of the plant?

A. That is correct. The general office, and a private office.

Q. There is a general office, with a railing?

A. That is right.

Q. And on the other side a very small private office?

A. Correct.

Q. Mr. Lunin came into the private office?

A. Yes, he did.

Q. What transpired in that conversation?

A. Mr. Lunin asked me if I received his letter. I said I did. He said he wanted to talk to me about being the bargaining representative of some employees. At that time I told him that Mr. A. J. Tobin was out of town, and I would appreciate it if he would wait until Mr. Tobin came back to take the matter up with him.

704 Q. What did Mr. Lunin say?

A. That was the extent of the conversation. Mr. Lunin then left.

* * * * * * * *

Q. All right. Now, when did you next hear from Mr. Lunin, Mr. Tobin?

A. I received a registered letter from Mr. Lunin, written August 30.

Mr. Constangy: It has been stipulated that the return receipt on that was signed August 31.

Q. (By Mr. Constangy) Therefore, Mr. Tobin, you must have received it on August 31.

A. That is right.

Q. I hand you General Counsel's Exhibit No. 4 (handing to witness). That is a copy of the registered letter you received?

A. Yes.

Q. Was that the next communication you received from Mr. Lunin after that?

A. That was the next time I heard from Mr. Lunin.

Q. Did you have any conversation with Mr. Lunin after that, Mr. Tobin?

A. I believe Mr. Lunin came in to see me in my office after that.

705 Q. How long after receipt of the registered letter?

A. Within a day or so.

Q. Within a day or so after receipt of the registered letter?

A. That is right.

Q. When I said "after that" I was referring to after receipt of the registered letter.

A. Yes.

Q. Can you tell us what, if anything, transpired when Mr. Lunin came into your office on that occasion?

A. Mr. Lunin came in at that time and said that he had either 97 or 98 percent of my employees in the union.

Q. What did you say?

A. I told him, "I don't believe you do" and I told him that I doubted it.

Q. What did he say then?

A. He didn't say much more on that score; but I also told him that I would appreciate it if he would wait until Mr. A. J. Tobin came back—that I did expect him within a few weeks or so.

Q. What was his reply to that?

A. There was no reply to that. Mr. Lunin then left.

Q. When did you next hear from Mr. Lunin?

A. The next time I saw Mr. Lunin was, I believe, the morning of September 7.

706 Q. Did you have any communication with him or from him at any time between this visit after the registered letter and the morning of September 7?

A. No, those were the only visits.

Q. Tell us what transpired first on the morning of September 7.

A. The first thing I knew I received a call from Mr. Dismukes about seven o'clock in the morning.

* * * * * * *

Q. Tell me what you did when you got to the plant.

A. I droye my car in the back gate and went in to see Mr. Dismukes.

* * * * * * * *

707 Q. What happened when you went in to see Mr. Dismukes?

A. Mr. Dismukes said, "There are two gentlemen waiting to see you." I walked with Mr. Dismukes toward the middle of the plant, toward the front.

Q. Yes?

A. Mr. Lunin and Mr. Reilly came from the front door and met us halfway in the middle of the plant.

Q. Was anyone with Mr. Lunin or Mr. Reilly at that time?

A. No, there was not.

Q. What happened then, Mr. Tobin? Who started the conversation?

A. Mr. Lunin started the conversation.

Q. Mr. Lunin started the conversation?

A. Yes.

Q. What did he say?

A. He said, "I guess you see there are some men across the street." I said I did. He said, "I'd like to put them back to work if you will sign a—" well, sign something.

Q. A recognition agreement?

708 A. A recognition agreement. That is correct.

Q. What did you say to that?

A. I said, "Mr. A. J. Tobin is still out of town and I'd appreciate it if you could wait until Mr. A. J. Tobin comes back, because he would be the man you'd have to see. I have no authority to do anything about signing an agreement. I am not the president of the corporation."

Q. What did he say to that?

A. He didn't say much to that.

Q. What else was said then?

A. That was all, I believe. That was about all that transpired.

Q. Did you or did anyone in your presence say anything in that conversation that unions are for carpenters, plumbers, electricians and bricklayers, but not for salesmen?

A. No, I heard no statement of that sort.

Q. Did Mr. Dismukes make any statement in that conversation?

A. Not to my knowledge.

Q. Did you make such a statement?

A. I did not.

Q. Did you say anything about not wanting to have anything to do with the union?

A. No, I did not.

Q. Was any statement made about the National Labor Relations Board?

709 A. No, I don't believe I even knew what the National Labor Relations Board was at that time.

* * * * * * * * *

Q. Was any mention made of the fact that your father was out of town in that conversation?

A. Yes, I did.

Q. What did Mr. Lunin say about that, if anything?

A. Mr. Lunin made no comment about the fact that my father was out of town.

Q. Was there anything said about any demands of the union or any requests of the union other than recognition?

A. No, the only thing Mr. Lunin stated was that he wanted me to sign a recognition agreement, and he would put the men back to work.

* * * * * * * *

710 Q. Did he tell you anything about which men or which group of men or which type of men or employees he was organizing or seeking to represent?

A. No. The only thing Mr. Lunin said was "employees."

Q. He said "'employees"?

A. That is correct.

Q. He did not specify any particular group?

A. No.

Q. Or groups?

A. No. I don't remember him saying anything about that.

* * * * * * * * *

711 Q. The only conversation you ever had with Mr. Lunin at any place other than your office was the one on the morning of the strike at the plant?

A. Yes, that is right.

Q. And the other conversations you had with Mr. Lunin were at your office?

A. At my office.

Q. What transpired on the 16th, or this date when you had the next conversation with Mr. Lunin?

A. At that time Mr. Lunin came into my office and said that he would like to put the men back to work if I would sign an agreement, and if I would sign that agreement he would put the men back to work and he would call the whole thing off.

Q. Who was present at that time?

A. I believe Mr. Dismukes was with me in the office at that time.

Q. Who was with Mr. Lunin?

712 A. Mr. Lunin was alone.

Q. Mr. Lunin was alone?

A. Yes.

Q. Was the agreement that he was asking you to sign a recognition agreement?

A. Yes. He said it was a recognition agreement, although I never did see any papers or anything else.

Q. Now, Mr. Tobin, at that time had there been a petition filed with the NLRB?

A. I had never received a copy of any petition.

Q. You had not received a copy of a petition?

A. No.

* * * * * * * *

713 Q. Did you make any statement in that conversation or in any other conversation with Mr. Lunin or Mr. Reilly, or with any of your employees present, that "I will have no union here" or "I will have no union in my plant"?

A. No, I never made any statement to that effect.

Q. Have you ever made a statement that you would not recognize a union?

A. No, I never did.

Q. Did you ever make a statement that you would not recognize a union?

A. I never did.

Q. Did you make a statement that you would not sign a recognition agreement?

A. I told them Mr. A. J. Tobin was the one they would have to see about signing any paper.

Q. All right. Now, Mr. Tobin, did you see Mr. Lunin after that conversation of the 16th at any time during September?

A. I believe the only other time I saw Mr. Lunin was in the presence of a Miss Hopkins.

Q. That was some weeks afterwards, wasn't it?

A. About three or four weeks afterwards.

* * * * * * * *

714 Q. Mr. Tobin, I hand you General Counsel's Exhibit
2-A, an election petition, and ask you whether or
715 not by the time of the conference with Miss Hopkins you had received that petition (handing to witness)?

A. Is there a date on this petition?

Mr. Bernstein: Yes.

The Witness: I believe this petition came in before Miss Hopkins came down. Yes, that's right.

* * * * * * * *

716 Q. Was there any discussion in your office as to the status of salesmen, as to whether or not they were employees?

A. I don't recall.

Q. Do you remember a discussion, if any, between you and your father in the presence of Mr. Lunin in which you told your father he was liar?

A. No, I have never told my father he was liar.

Q. Was there any such discussion that went on at that meeting?

A. No, there was not.

Q. Mr. Tobin, did you have a further conference with Miss Hopkins after the one in your office?

A. Yes, there was a conference with Miss Hopkins at Mr. Bernstein's office about one-thirty that same afternoon.

Q. Was there some discussion there of the question of unit and commerce and some other matters?

A. Yes, there was a bit of legal discussion at that time.

Q. Who was doing the discussing?

A. Mr. Bernstein and Miss Hopkins were participating in most of the discussion.

* * * * * * *

717 Q. Did you make any statement to Mr. Reilly, to Mr. Klein, to Mr. Shannon, or to Mr. Croon—particulary to Mr. Croon—to the effect that you didn't want anything to do with the union or anyone connected with it?

A. No, I never made a statement to that effect.

Q. Did you at any time during the period between September 7 and your conference with Mr. Lunin on September 16 or thereabouts, have any group conference with your employees—your striking employees particularly?

A. No, I never did have any conference with the striking employees.

Q. Mr. Tobin, I will ask you to tell us how you worked out the arrangements, if any, for paying the men off on the Friday during the strike.

A. The pay roll is usually made up on Thursday afternoon and finished Friday morning. For a specific reason we decided, or I decided, to pay the men off at the office instead of the usual procedure of sending the pay roll up to the plant.

718 Q. What was that reason?

A. We wanted the men to come into the office one at a time in order that they be able to ask for their jobs back.

Q. Had you had any indication that they were going to ask for their jobs back?

A. No, I did not.

Q. What did you hope to accomplish by that?

A. I was hoping the men would come back to work and we could put the trucks back on the street.

Q. Did the men come into the office one at a time on that day?

A. Yes.

Q. Did you have any conversation with any of them when they came in one at a time?

A. In the case of the majority of them, I handed them the pay, they just said "Thank you," and turned around and left.

Q. Did any of them make application for employment at that time?

A. No formal application.

Q. Did any of them say that they wanted to come back to work?

A. Yes, I think there were two of them.

Q. Who were they?

A. Mr. Voight was one person who stated that he would like to come back to work.

* * * * * * * *

719 Q. Did anybody else say he wanted to come back to work?

A. Mr. Treacy came into my office that same afternoon for his pay. He wanted to know what was going on. He said that he'd like to come back to work. He said, "When will the plant be running?"

Q. What did you say to him?

A. I told him that I thought it would be running Monday.

Q. Did he say he was coming back?

A. He said he would be there.

Q. Did you know at that time that either Mr. Voight or Mr. Treacy had been picketing?

A. I believe I had seen both Mr. Voight and Mr. Treacy picketing.

Q. All right. Now, Mr. Tobin, do you remember in that group of employees coming in there, whether Mr. Nat Freeman came in to get his pay?

A. Yes, I do.

Q. Was anybody with you at the time these men came in?

720 A. Mr. Dismukes was with me all the time in the office.

Q. Did Mr. Freeman have anything to say when he came in to get his pay?

A. No. Mr. Freeman took the pay envelope, turned around, and left.

Q. Did Mr. Freeman say anything that sounded like, "What's gonna be, Mr. Tobin?"

A. No, he did not.

Q. Did he say anything about "Why don't you let the men go back to work until the NLRB can settle this matter?"

A. No, Mr. Freeman did not say a word in my office.

Q. Now, Mr. Tobin, do you remember whether or not you had any individual conversation with any of your employees during the period of the strike other than those that you have related on the day you paid them off?

A. Which employees?

Q. Employees who were on strike.

A. No, I had no other conversation.

Q. Did you talk to any committee of strikers?

A. No, I never did.

* * * * * * *

721 Q. Did any of the strikers either talk to you or did you talk to them during the period of the strike?

A. No, I did not.

Q. About coming back to work, other than Mr. Treacy and Mr. Voight?

A. No, no other employees spoke to me.

Q. Did any committee of employees come to you?

A. No, there was no committee came to see me.

Q. Did they ever come to Mr. Dismukes in your presence?

A. Never in my presence.

Q. All right, Mr. Tobin, I will ask you whether you did, on September 4, September 7, September 10, or at any other time, threatened or warned any employee of the Seven Up Bottling Company to refrain from assisting or

becoming members of or remaining members of the Teamsters' Union or any other union?

A. No, I never did.

Q. Did you ever have any discussion in which you threatened, warned or even suggested to employees that they should or should not join or belong to or stay in the union?

A. No, I never did.

Q. All right. Now, Mr. Tobin, I will ask you specifically whether or not on September 7 you stated to Mr. Lunin, Mr. Reilly, Mr. Freeman, Mr. Shannon, Mr. Croon, or any of them or any combination of them, that you would
722 reinstate only one or two of the striking employees?

A. I never did.

Q. Did you ever say anything to Mr. Lunin at any time, or any of these men, that only one or two of these men would be reinstated?

A. I never did.

Q. Did you ever say anything that sounded like "Only one or two of them are any good anyway"?

A. No, I never did.

Q. Did you on or about September 9, 1948, which is two days after the strike began, receive from Mr. John J. Lunin and Mr. Francis Reilly in any form whatsoever, oral or written, an application for reinstatement on behalf of the employees that were on strike?

A. On September 9 I did not.

Q. Did you see Mr. Reilly or Mr. Lunin to speak to at any time between September 7 and September 15 or 16?

A. No, I never did.

Q. Did you have any telephone conversations with them?

A. No, I never did.

* * * * * * * *

723 Q. (By Mr. Constangy) Did you have an application made to you, Mr. Tobin, by Mr. Klein on September 25 or thereafter?

A. No, I received no application from Mr. Klein.

Q. Did you have any conversation with Mr. Klein?

A. No, I hadn't spoken to Mr. Klein?

Q. Did he telephone you?

A. No, he didn't.

Q. Now, Mr. Tobin, did you know that there was going to be a strike at the Seven Up Bottling plant prior to September 7, 1948?

A. No, I did not.

Q. Did you have information about it? Any information about it?

A. No. The only thing I knew about unionization activities was the two letters and personal calls from Mr. Lunin.

Q. Did you have any conversation with Mr. Carnifax about it?

A. No, I did not.

Q. Did you have any conversation with Mr. Carnifax about employee dissatisfaction or wage adjustments, or anything of that sort?

724 A. I don't recall any.

Q. Did Mr. Carnifax tell you the boys were organizing a union—"they are going to strike"—or anything to that effect?

A. No. Mr. Carnifax spoke to me at no time in that vein.

Q. Did Mr. Dismukes tell you anything to that effect?

A. No. Mr. Dismukes saw a copy of my first letter that was sent to the Seven Up Company. That's all.

Q. Did you have any discussion with him as to strike, union, or anything of that sort?

A. Not particularly. I was expecting them to wait until Mr. A. J. Tobin came back to Miami.

Q. Had you had any such conversation with Mr. Chapman?

A. No, I hadn't.

Q. Mr. Tobin, did you communicate the fact that Mr. Lunin had written or been in to see you to your father during this period?

A. No, I did not notify my father.

Q. Any reason why you did not?

A. My father was ill, under treatment in New York at that time.

Q. Will you tell us the nature of his illness?

A. He had a sickness in his phlebitis, I believe, and it was giving him a great deal of trouble. His legs were swollen up twice their normal size, and I felt that aggravation and worry would not be beneficial to his disease or to him.

• • • • • • • •

725 Q. (By Mr. Constangy) Mr. Tobin, did you during that period, or in connection with this, communicate with your mother in any way?

A. No, I did not.

Q. Did you discuss the business with your mother?

A. Very rarely.

Q. Did your mother take any active part in the management of the business?

A. No.

Q. Has she, since or before the incident?

A. No, she has never taken any active part.

Q. The active management of the business has always been with your father?

A. Yes, Mr. A. J. Tobin has been in the business all the time.

Q. I believe you testified earlier that you became an officer of the corporation in April, 1948.

A. That is correct.

• • • • • • • •

726 Q. (By Mr. Constangy) Will you tell us when you first discussed this matter with your father?

A. My father first learned of this matter the day he arrived back in Miami, a few days before Miss Hopkins came down.

Q. Some time shortly prior to September 27, is that correct?

A. That is correct.

Q. Did you tell him about it?

A. Yes, I did.

Q. Did you bring him up to date in connection with what had transpired?

A. Yes, I told him everything that had happened.

* * * * * * * *

Cross-Examination.

* * * * * * * *

727 Q. And you were unwilling to recognize the union until your father did return to the city?

A. I told Mr. Lunin that I could not sign any agreement.

Q. As a matter of fact, you would not sign an agreement in your father's absence, is that correct?

A. I told him that I couldn't sign an agreement.

Q. Was that actually the fact?

A. That I couldn't sign an agreement?

Q. Yes.

A. Yes.

Q. For that reason you would not do so?

A. I was not the president of the corporation.

Q. And you would not take it upon yourself to sign a recognition agreement?

A. That is right.

Q. Or to grant recognition to the union in any other way?

A. That is right.

Q. At the time you first talked with Mr. Lunin you did not know when your father was coming back, did you?

A. I knew he was sick and that he would be away for quite a while.

Q. Did you have any idea at that time how long it would be?

A. I knew it would be about a month or so. That was the estimate his doctor in Miami told him when he left.

Q. Did you tell Mr. Lunin how long you thought
728 your father would be away?

A. Yes, I did.

Q. What did you say to Mr. Lunin?

A. I told Mr. Lunin that it would be a matter of a few weeks, more or less. I don't know.

Q. Did you suggest to Mr. Lunin when he should call back?

A. I told Mr. Lunin that I would appreciate it if he would wait until my father was back in Miami.

* * * * * * * *

Q. Why was it that you considered that you did not have authority to recognize the union?

A. I had been an officer for approximately three
729 months at that time, and my title was secretary-treasurer. I did not feel I was in charge of the business.

Q. You felt that you had to be in charge of the business in order to recognize a union?

A. I felt that I had to be president of the business, or told that I was in charge.

* * * * * * * *

730 Q. Was there anything necessary to the operation of the business that you did not have authority to do?

A. I did not have authority to put on a new product.

Q. Other than Seven Up?

A. That is correct. That is a major policy change. I did not have anything to say about major policy changes.

Q. Then that's what you mean—you didn't have authority to make major policy changes?

A. That is correct.

Q. And you considered that recognizing a union would be a major policy change?

A. I believe anybody would consider it so.

* * * * * * * *

739 Q. Independently of those letters, was there any conversation between you and Mr. Lunin about the proper bargaining unit?

A. In the second conference with Mr. Lunin, the second meeting, he stated that he had 97 or 98 per cent of the employees as members of the union. I told him I doubt that. That was as far as the conversation on that point ever went.

Q. Did he say 97 or 98 per cent of the employees, or did he say 97 or 98 per cent of the driver-salesmen?

A. Of the employees of the Seven Up Bottling Company.

* * * * * * * *

740 **Redirect Examination.**

741 Q. (By Mr. Constangy) Mr. Tobin, there are some questions I want to clear up. In testifying on cross-examination, you stated that you were unable to sign an agreement because you couldn't sign an agreement. I think you later clarified it, but do you mean by that you did not have the authority to sign an agreement?

A. That is right. I did not have the authority.

* * * * * * *

Q. Now, Mr. Tobin, I have one other question. You were asked about what Mr. Lunin said in his letters. You did finally get a communication, signed by Mr. Lunin, in which he mentioned bargaining unit, did you not?

A. Yes, I did.

Q. Did you get a communication or a copy of this petition in which a unit is specified as all driver-sales-
742 man and plant help?

A. Yes, I did.

Q. And that was dated September 13, wasn't it?

A. Yes, September 13.

Q. And it was not until October 7 or thereafter that you got a petition stating all driver-salesmen, is that right?

A. That is right.

Q. And between those two you had had a conference with Miss Hopkins present in which the first petition was reiterated?

A. That is right.

* * * * * * *

745 Q. Did you have a title before it was a corporation?

A. No, before it was incorporated, I was just an employee.

Q. Where did you work before it was incorporated?

A. At the office.

Q. Doing substantially what you are doing now?

A. That is correct.

Q. At that time your father was the owner?

A. That is right.

* * * * * * *

748 Mr. Bernstein: As one of the counsel for the Seven Up Bottling Company of Miami, I should like to make a statement for the record. The statement would concern itself primarily with General Counsel's Exhibit No. 22, being a letter dated October 18, 1948, to Mr. Paul L. Styles, although incidentally a statement might be made concerning General Counsel's Exhibit No. 23, which is a letter to Mr. Styles dated February 28, 1949.

I wrote both of these letters, including the exhibits. They were dictated by me in my office. As I recall it, even the one on the Seven Up stationery was typed in my office, the client having sent some of its stationery there. They came about in the following way:

I had been employed by my client after the strike took place. I would say it was either on the afternoon of Labor Day, September 7, 1948, or the morning of the next day.

Trial Examiner Hunt: Labor Day was September 6.

Mr. Bernstein: I don't mean Labor Day, sir. I'm sorry. It was either the day of the strike, the day after Labor Day, which I understand to be September 7, 1948, or the

day following. I don't remember exactly which it was, but the men had already walked out.

In due course my client received a letter from Miss Hopkins, the field examiner of the National Labor
749 Relations Board, stating that she would be at the company's office at 10:30 a. m. on September 27, 1948, to discuss a petition which had been filed and which had been sworn to under date of September 13, 1948, for an election to determine the bargaining agent.

Miss Hopkins ultimately came to my office around the middle of the day, on September 28, 1948, with Mr. Sherman Tobin, and she very pleasantly and charmingly asked that we discuss our position, stating that she was just investigating, it was perfectly impartial, she was just trying to get the facts.

We stated in substance that we thought the union had been rather abrupt and perhaps quite unfair to our clients in that they had taken a kid—that was the language I used, I think—who had been an officer for only a few months, when his father was ill and away, and given him an ultimatum, where he had not had and did not have sufficient authority or, in my opinion, experience to deal with the matter, and in that they had refused to wait just a few weeks for his father's return.

I stated next—I think I pulled out a Prentice-Hall Labor Relations Service—that under the early cases at least there was quite a question of commerce, although I thought perhaps the later cases might make it not so close, that I thought we should not waive that if the thing ever got into court we shouldn't like to waive the question
750 of whether or not the company was engaged in commerce.

I had looked at the petition, which spoke of driver-salesmen and plant help, and said that we had been briefing some law in that same Prentice-Hall Labor Relations Service, and that there were some very close cases as to

whether or not the drivers were independent contractors or not, that in other branches of federal law I had had some independent contractor cases, and that there had been some holdings, pretty close to this, and that we should not like to waive that point, we should like to preserve our record on it, but I told her that I thought the substance and the crux of our position on this petition for an election was controlled by a case which I had found in the Service—I think it was the Times Square Publishing Company case—a case which I construed to mean that since the employees had gone out and their jobs had been filled that any election would be participated in by the new employees rather than the old.

I told Miss Hopkins that this talk about the election just seemed to be very formal, because an election with new employees who had just come in and who had no union affiliation so far as we knew could only result in one thing, and so why all the hullaballoo about an election. I asked her if she agreed with that legal position and whether that case was controlling, and she said yes, she did. Then she said, "Will you consent to an elec-
751 tion?" and I said, "If that case controls, without even going much further or communicating with Mr. Tobin, Sr."—who was not there—"I would surely recommend it, but I doubt if the union would stipulate to an election in view of this decision, which would not have the men who walked out vote, but the men who had replaced them vote," and I said further that if she would find out from the union's representatives if they would consent and stipulate to an election, that I would 100 per cent recommend to my clients that they do consent, and that I was sure they would. Mr. A. J. Tobin was not in my office, and I would ultimately talk to him, but I could assure her personally that that would be done, and for her to inquire of the other side with the understanding that I would recommend it if she did, and let her know.

She called the next day and said, "I'm sorry, the union advised me they will not consent to an election," so I said, "Well, I suppose that ends that, because if we had the election, I know how it would work."

Then I heard no more from Miss Hopkins and then a little later, some little time later, I received from someone at the Seven Up Bottling Company a copy of an amended petition which apparently was sworn to on October 6, 1948, and along with that I was shown a letter, which I remember some of the substance of. It was a formal letter, and we have some just like it with reference to other petitions, or almost exactly like it.

752 As I recall it, there was some statement near the end of the letter which said something like, "I would appreciate your cooperation in making an equitable disposition of this matter and giving us a statement of your position." Now, that is not a direct quotation, but it was something asking for a reply to disposition of the matter equitably. I don't recall the exact language, but it asked for a statement of position and it said something about their liking to disposition of it and to give them that information with the statement of position so that they could dispose of the matter or settle the matter, or something along that line. It asked for it in a friendly spirit of cooperation to settle or dispose of the case, as I recall it. At least that is what I thought it said.

So I communicated with the Seven Up office and obtained some information—I think it was perhaps over the phone. I think I talked to Mr. Dismukes and perhaps to Mr. Sherman Tobin. I might even have said something to Mr. A. J. Tobin, although he was not here at the time. On the strength of that material which I obtained, I considered the writing of a letter.

I had in mind that we had already told Miss Hopkins our fundamental position the first time she was down. We all had gone into it and she wrote it down. We spoke slowly, and she was taking notes.

753 I have now found the letter of October 7, 1948, which attached the copy of that amended petition that I was trying to remember a moment ago.

Trial Examiner Hunt: All right. We will mark that as your exhibit next in order.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 7 for identification.)

Mr. Bernstein: It ended up with a request that they would appreciate a written statement of our position on the proposed petition, which was a petition for an election for bargaining agent and not anything else.

So I say I obtained this information, I think, mostly over the phone, but partly with that, I undertook to write a letter, and I took into consideration in writing the letter that just a short while before that Miss Hopkins had come down and made several pages of notes after her conversation with me and with Mr. Sherman Tobin in my office, and there was no particular reason for hashing all that over again, so I wrote this with the high spots—

Mr. Constangy: By "this" you refer to what?

Mr. Bernstein: I mean General Counsel's Exhibit 22, our letter of October 18, 1948, and then I asked Mr. Sherman Tobin if he would sign it, if it was correct. He read it. That is the background of that.

The reason the letter was not more full is because
754 we figured we had already explained to a representative of that regional office everything she wanted to know, and had given her all the information, and this was a little pro forma statement, preserving grounds.

Mr. Constangy: Was any charge pending at that time?

Mr. Bernstein: No charge of any kind was pending, and the only thing we were writing about was an amended petition, and we thought she had all the information anyhow—that this was just a question of putting in some formal contentions. Now, after that time, some time later—

* * * * * * *

756 Mr. Bernstein: I have just heard the witness, Sherman Tobin, examined concerning certain statements appearing in an affidavit, one statement being to the effect that he was the general manager of the Seven Up Bottling Company of Miami, Inc., and one statement being in a letter referred to in the affidavit, that statement being that after the positions were permanently filled, one driver-salesman, who had formerly worked for the company, asked for his position back but we were unable to give him his position back because this position had been permanently filled.

In connection with said affidavit, and the statement in the letter therein referred to, I should like to state for the record that I prepared in my office the affidavit and the letter. I prepared it from information which I obtained from various people working with the company, some over the phone and perhaps some by a personal interview. I understood the statements in there to be correct from the information which I had received.

However, this was the first time I had ever represented this company or had ever met any of the officers or employees. By this I mean this representation. I had never represented them before this particular time, and I understood we were merely giving informal information

757 to the National Labor Relations Board at its request.

I was not then nor am I now General Counsel for the Seven Up Bottling Company, Inc., of Miami, nor have I represented it in connection with its corporate matters. I did not incorporate the company nor prepare any of its minutes or by-laws nor work on any of its set-up.

* * * * * * *

GENERAL COUNSEL'S EXHIBIT NO. 22.

(Copy)

Seven-Up Bottling Company
1655 North Miami Avenue
Miami 26, Florida

October 18, 1948

Mr. Paul L. Styles,
Regional Director,
National Labor Relations Board, Tenth Region,
Atlanta National Building,
50 Whitehall Street,
Atlanta 3, Georgia.

Re: Case No. 10-RC-370.

Dear Mr. Styles:

We have your letter of October 7th, together with copy of amended petition in the above matter.

You have asked us to send you a written statement of our position on the amended petition. Our position is the following:

1. We feel that we are not engaged in interstate commerce, that our business does not affect interstate commerce in any way, and that we are subject to the labor laws of the State of Florida and not to the labor laws of the federal government.

2. We think that the Driver-Salesmen, who are the only people mentioned in the amended petition, are independent contractors and not employees.

3. The amended petition is not completely filled in. It does not specify the number of employees in the unit, or the number supporting the petition, or the percentage.

There are a great many other blanks left in the amended petition.

4. The Driver-Salesmen walked out and left on September 7, 1948, and refused to work. On September 12, 1948, the positions were permanently filled by new people; except that, before these places were permanently filled, one Driver-Salesman who walked out came back and is with us. All of the positions of Driver-Salesmen have been permanently filled, one by a former employee who walked out and came back, and all of the others by new employees. We think that all of the Driver-Salesmen who left us, with the exception of one whom we have re-employed, have obtained positions elsewhere. Nothing has happened in this matter for quite some time, and we believe that it has died down and just about become a dead issue.

Very truly yours,

/s/ S. J. TOBIN,

Secretary-Treasurer.

RESPONDENT'S EXHIBIT NO. 5.

Payroll

Sept. 15, 1948

		Salary	S. S.	W. T.	Net	Adv.	Amt. Rec.
O. Palaske		41.67	.42	2.40	38.85		38.85
H. Chase		41.67	.42	.50	40.75	4.94	35.81
C. Voight		39.40	.39		39.01		39.01
R. Legge		41.67	.42	.50	40.75	6.40	34.35
G. Wood		55.30	.55	2.50	52.25	.01	52.26
B. Thomas		35.90	.36	2.40	32.14	.92	33.06
S. Perretti		41.67	.42	.50	40.75	1.74	39.01
R. Caziarc		31.90	.32	.90	30.68	.36	30.32
R. Nelson	(4.00)	80.20	.80	8.30	71.10	11.50	59.60
Wm. I. Hancock		33.33	.33		33.00	.52	32.48
J. Bell		33.33	.33		33.00	3.71	29.29
R. Daugherty		33.33	.33	3.10	29.90		29.90
D. Krug		20.00	.20		19.80		19.80
W. Connolly		16.67	.17		16.50	3.95	12.55
F. Cutshaw		33.33	.33	1.20	31.80		31.80
D. Chapman		80.00	.80	4.40	74.80	1.40	73.40
C. Carnifax		80.00	.80	4.40	74.80	.10	74.70
C. Dismukes		80.00	.80	6.40	72.80	40	72.40
G. Prescott		75.00	.75	1.60	72.65		72.65
R. Brown		65.00	.65	6.10	58.25	9.15	49.10
L. Baruch		75.00	.75	5.50	68.75		68.75
H. Seneker		32.50	.33	2.90	29.27		29.27
E. Hokin		40.00	.40	.30	39.30		39.30
D. Cohen		100.00	1.00	7.70	91.30		91.30
A. Mack		47.60	.48	3.30	43.82		43.82
W. Treaty		19.13	.19		18.94		18.94
R. Bobbe		12.25	.12		12.13		12.13
H. Tripp		14.73	.15		14.58		14.58
L. Marshall		7.60	.08		7.52		7.52
J. Deverow		7.60	.08		7.52		7.52
E. Hanna		12.13	.12		12.01		12.01
R. Hewitt		35.93	.36	3.40	32.17		32.17
R. Vertgewall		35.35	.35	1.50	33.50		33.50
S. Wyche		3.10	.03		3.07		3.07
		1402.29	14.03	70.80	1317.46	43.24	1274.22

Sales—7-Up	815.37
Cooler	4.00
Truck	75.00
Refrig.	65.00
Adv.	.....
Office	147.50
Labor	295.42
	1402.29

Office - Supreme Court, U. S.
FILED
JUL 21 1952
CHARLES ELMORE CROPLEY

217

No. —

In the Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	7
Reasons for granting the writ	7
Conclusion	15
Appendix	16

CITATIONS

Cases:

Home Beneficial Life Ins. Co. v. *National Labor Relations Board*, 172 F. 2d 62	14
National Labor Relations Board v. *Bird Machine Co.*, 174 F. 2d 404	14
National Labor Relations Board v. *Don Juan Co., Inc.*, 185 F. 2d 393	12
National Labor Relations Board v. *Entwistle Mfg. Co.*, 120 F. 2d 532	8
National Labor Relations Board v. *Gullett Gin Company, Inc.*, 340 U. S. 361	9
National Labor Relations Board v. *New York Merchandise Co.*, 134 F. 2d 949	14
National Labor Relations Board v. *Pacific Mills*, C. A. 4, No. 6257, 91 NLRB 60	15
Phelps-Dodge Corp. v. *National Labor Relations Board*, 313 U. S. 177	5, 9, 10, 12
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U. S. 793	14
Securities & Exchange Commission v. *Chenery Corp.*, 332 U. S. 194	14
Wallace Corp. v. *National Labor Relations Board*, 159 F. 2d 952	14
F. W. Woolworth Company, 90 NLRB 289,	2, 3-5, 6, 7, 8, 11, 12, 13, 14

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*):	
Section 8 (a) (3)	16
Section 8 (b) (2)	16
Section 10 (c)	8, 17

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 29, 1952 (R. 128), which denied in part the petition of the Board for enforcement of its order against Seven-Up Bottling Company of Miami, Inc.

OPINIONS BELOW

The opinion of the court below (R. 124-128), is reported at 196 F. 2d 424. The findings of fact, conclusions of law, and order of the Board (R. 71-114) are reported at 92 NLRB 1622.

JURISDICTION

The judgment of the court below was entered on April 29, 1952 (R. 128). A petition for rehearing,

filed by the Company on May 16, 1952, was denied on June 18, 1952 (R. 129, 134). The decree, detailing the terms of the judgment, was entered on July 8, 1952 (R. 136-138). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Since its decision in *F. W. Woolworth Company*, 90 NLRB 289, the National Labor Relations Board has determined the back pay to which an employee discriminatorily denied employment is entitled by computing the employee's net loss in earnings for each three-month calendar period and totalling the quarterly net losses. Under this method of computation, earnings in any quarter which exceed the amount the employee would have earned in the employment from which he was discriminatorily barred are not treated as diminishing the net loss for any other quarter. The question presented is whether the Board may use this method of computing back pay or whether, as the court below held, the Board must use its former method of deducting from the amount the employee would have earned in the job he was discriminatorily denied, during the period of discrimination taken as a whole, the employee's total earnings in other employment for that period.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C.,

Supp. IV, 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 16-18.

STATEMENT

The Board found that eleven employees had been discriminatorily denied reemployment by the Company at the end of a strike (R. 74-75, 102-104), and ordered their reinstatement with back pay (R. 76-77, 105-106). The order directed that back pay "be computed upon a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*," 90 NLRB 289, decided on June 12, 1950 (R. 106). In *Woolworth*, the Board discontinued its previous method of computing net loss of earnings by deducting from the amount the employee would have earned absent discrimination all sums earned throughout the entire period from the date of discrimination to the date of an offer of reinstatement by the employer or waiver of reinstatement by the employee (90 NLRB, at 291). In its stead, the Board adopted the method of computing the net loss during each three-month calendar period, and of totalling the net losses for each quarter to determine the back pay due. Under this method, earnings in one quarter greater than the employee would have obtained in the position from which he was discriminatorily barred are not carried over from one quarter to another to diminish the employee's recovery (90 NLRB, at 292-293).

In *Woolworth*, the Board stated the reasons which underlay its adoption of the new formula. The Board explained that experience had shown

that, frequently, as the period of discrimination increased, the amount of back pay due under the former method of computation decreased (90 NLRB, at 291-292):

> * * * We have noted in numerous cases that employees, after having been unemployed for a lengthy period following their discriminatory discharges, have succeeded in obtaining employment at higher wages than they would have earned in their original employments. This, under the Board's previous form of back-pay order, resulted in the progressive reduction or complete liquidation of back pay due.

The Board further explained that the result of this diminution of back pay was to devitalize the reinstatement remedy (90 NLRB, at 292):

> The deleterious effect upon the companion remedy of reinstatement has been twofold. Some employers, on the one hand, have deliberately refrained from offering reinstatement, knowing that the greater the delay, the greater would be the reduction in back-pay liability. Thus, a recalcitrant employer may continue to profit by excluding union adherents from his enterprise. Employees, on the other hand, faced with the prospect of steadily diminishing back pay, have frequently countered by waiving their right to reinstatement in order to toll the running of back pay and preserve the amount then owing. Upon analysis of a substantial number of cases involving such action, we have found the economic motivation

and compulsion upon the employee not difficult to discern. Unemployment or employment at lesser wages may have resulted in the exhaustion of the employee's savings, his incurrence of debts, and even in deprivation of the necessities of life. Our observation on this score accords with the view of the United States Supreme Court which, in treating this general problem, recognized that the worker is "not likely to have sufficient resources" to sustain the necessary "minimum standard of living necessary for health, efficiency, and general well-being" during such periods." [*Brooklyn Saving Bank* v. *O'Neil*, 324 U. S. 697, 707.] The consequent desire of the victim of discrimination to recoup the maximum amount possible in order to offset such losses, even if this must be accomplished at the price of relinquishing the right to be returned to his former position, may readily be anticipated. The Board has viewed these results with concern because we, as well as the courts of review, have long regarded the remedy of reinstatement as one of the most effective measures expressly provided by the Act for expunging the effects of unfair labor practices and maintaining industrial peace." [*Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 195.]

The Board concluded that its duty in unfair labor practice cases to seek "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge Corp.* v. *National Labor Relations*

Board, 313 U. S. 177, 194, quoted in 90 NLRB, at 292) could best be fulfilled if back pay were computed by quarterly periods, with earnings for any single quarter having no effect upon back pay liability for any other quarter. This, the Board determined, would "constitute an appropriate, fair and practicable method of computation," referring the liability to current factors and avoiding the possibility of later fluctuations which had been found to impair the reinstatement remedy. 90 NLRB, at 293. Finally, the Board observed (*ibid.*) that its revised formula "conforms with and facilitates the prescribed practice of the Social Security Administration," which is required, in restoring an employee's Old Age and Survivors Insurance account, to allocate payments of back pay ordered by the Board (which are "wages" within the meaning of the Social Security Act) to the calendar quarters in which the money would have been earned.

In the instant case, on the Board's petition to enforce its order (R. 1-9), the court below, granting the petition in all other respects, disapproved the computation of back pay on a quarterly basis and directed that the Board utilize its former method. The court stated that (R. 128):

> Whatever method of computation is used, there will be occasional hardship cases one way or the other, but these exceptional cases should not determine the rule. The ordinary case should be the criterion. The employee is entitled to be made whole, but no more. The

employees here involved were not compensated on a quarterly basis. We see no sufficient reason to so compute their back pay during suspension. When a hardship case arises, it can be decided on its own facts. It does not appear that these employees will not be made whole by computing their back pay continuously over the whole period of their suspension, the method followed by the Board itself prior to the *Woolworth* case. We hold such method, rather than the quarterly method, should be followed here. There is nothing to indicate that the conditions apprehended by the Board in the *Woolworth* case, exists here.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Board may not compute back pay on a quarterly basis in accordance with the *Woolworth* formula.

2. In failing to enforce the back pay order of the Board in full.

REASONS FOR GRANTING THE WRIT

1. The *Woolworth* formula for computing an employee's loss of earnings resulting from discrimination, which the court below held invalid, applies to every back pay order entered by the Board in a contested proceeding and controls, as well, the computation of back pay in cases adjusted by settlement since June 1950.[1] In the twelve-

[1] The *Woolworth* formula applies not only to back pay orders issued against employers, but also to such orders issued against unions which have caused discrimination in violation of Section 8 (b) (2) of the Act.

month period ending March 31, 1952, 162 back pay orders incorporating the *Woolworth* formula were entered in contested proceedings covering 1,484 workers, of whom 1,161 were ordered reinstated in conjunction with the award of back pay. During the same annual period, in both contested and settled cases, more than $524,000, computed in accordance with the *Woolworth* formula, was paid in back pay to 1,231 employees.

It is clear, therefore, that the validity of the Board's use of the *Woolworth* formula presents a significant question of general importance. Since discrimination against "an employee because of his union affiliations goes to the very heart of the Act" (*National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. A. 4)), the remedy the Board may properly employ to overcome it is obviously vital. Indeed, the number of back pay orders which come before the court below alone, as well as the many Board cases arising within its judicial circuit which do not reach it for review, demonstrate the need for speedy resolution of the issue posed here.

2. In promulgating the *Woolworth* formula, the Board exercised the authority granted it by Section 10(c) of the Act to require "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The determination of the remedy to fit the policy is "committed to the Board," and because the relationship between the two "is peculiarly a matter for administrative competence,"

in reviewing the remedy fashioned by the Board "courts must not enter the allowable area of the Board's discretion * * *." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 194. Recently reiterated (*National Labor Relations Board v. Gullett Gin Company, Inc.*, 340 U.S. 361, 362-363), this standard of review was unheeded by the court below in disapproving the *Woolworth* formula.

(a). The Board's basic reason for changing the method of computing back pay was its discovery that the prior method of computation was, in practice, undermining and frustrating the equally important remedy of reinstatement. Under the former method, whenever an employee began to earn more than he would have earned in the position from which he had been discriminatorily severed, it was to the wrongdoing employer's advantage to delay reinstatement as long as possible, since the longer the delay the more his back pay liability would diminish. On the other hand, the employee in such situations was faced with the dilemma of either watching his already accumulated back pay claim steadily decrease or waiving his right to reinstatement. As the Board observed (*supra*, pp. 4-5), the severe economic detriment sustained by an employee during unemployment, which cannot be truly compensated by increased earnings over a future and protracted period, all too often induced employees to follow the latter course. The former method of computing back pay was thus tending to transform the concomitant

remedies of "reinstatement with * * * back pay" into alternative and mutually exclusive remedies.

This Court has recognized that reinstatement *with* back pay is indispensable to undo the effects of discrimination (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 193-194):

> * * * to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization. * * * According to the experience revealed by the Board's decisions, the effectuation of this important policy generally requires *not only compensation for the loss of wages but also offers of employment to the victims of discrimination.* Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. [Italics added.]

When its experience showed that the former method of computing back pay was functioning as a positive deterrent to "offers of employment to the victims of discrimination", it was plainly within the discretion of the Board to adjust the means of computation to correlate with, rather than to militate against, the companion remedy of reinstatement. This the Board attempted to do by adopting a method of computation which, in part, removes the employee's incentive to waive, and the employer's incentive to delay, reinstatement.

Rejecting this solution, the court below reasoned (R. 128) that employees are "entitled to be made whole, but no more," and that computation of back pay under the revised method, because it may result in a larger recovery by the employee than he would have received under the former method, results in making the employee more than whole. But this argument rests upon the erroneous assumption that the sole appropriate basis for measuring the loss sustained by the employee is the overall period from the date discrimination begins to the date discrimination ends. The fact, as shown by the Board's experience, was that under the prior method of computation the loss period did not necessarily coincide with the total period of discrimination. When an employee waived reinstatement so that his accumulated back pay would not be depleted, the period for computing back pay ended though the employer's discrimination did not end. All that happened was that the employee, to recoup his actual losses, acquiesced in continued discrimination by relieving the employer of the obligation to offer him reinstatement. The significant difference under the *Woolworth* formula is that the employee has no need to sacrifice the reinstatement remedy in order to prevent loss or diminution of his accrued back pay claims.

Concentrating entirely upon the fallacious assumption that the overall period of discrimination is the only possible measure of the back pay which will make the employee precisely "whole," the court below excluded from consideration the impact

of this assumption upon the right to reinstatement, the very factor which led the Board to adopt the *Woolworth* rule. By viewing the back pay remedy as isolated from the related reinstatement remedy, the court assimilated the function of back pay "to the correction of private injuries" and ignored its transcendent role of vindicating a public wrong (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 192-193). Confronted with a choice between adopting a new mode of computing back pay (which may result in a larger award) or permitting enfeeblement of the reinstatement remedy, it was wholly appropriate for the Board to place a risk of increased liability upon the wrongdoer who has caused and persisted in discrimination rather than upon the employee who, having suffered discrimination, should not be further victimized by sacrifice of his right to reinstatement. Cf. *National Labor Relations Board* v. *Don Juan, Co., Inc.*, 185 F.2d 393 (C.A. 2). Even if the propriety of the Board's judgment were more doubtful, it would be clear, we submit, that, in substituting as its own the alternative the Board had found inadequate, the court below has erred in failing to "guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps-Dodge Corp.* v. *National Labor Relations Board*, *supra*, at 194.

(b). In disapproving the *Woolworth* formula, the court below stated (R. 128) that "exceptional cases should not determine the rule," but the "ordinary case should be the criterion," and that "what-

ever method of computation is used, there will be occasional hardship cases one way or the other." But this erroneously assumes that the *Woolworth* rule effects unnecessary revisions in back pay awards in cases for which the old method of computation would be adequate. The fact is that the *Woolworth* formula results in larger back pay awards than the old formula only in a case where, after a period of unemployment or employment at lower wages than the offending employer paid, the employee begins to earn more than he would have earned in the job which was wrongfully denied him. And it is this type of situation, where back pay liability would be diminished by continued refusal to grant the reinstatement the Act commands, which required the altered method of computation. Thus, far from effecting the aberrational change the court below erroneously envisions in cases which required no change, the Board's revised formula is precisely adapted to eliminate the impairment of the reinstatement remedy which the "cumulative experience of many years" under the old formula had revealed (90 N. L. R. B. at 291).

(*c*). The court below suggests, finally (R. 128), that "there is nothing to indicate that the conditions apprehended by the Board in the *Woolworth* case, exists here," and that "when a hardship case arises, it can be decided on its own facts."[2] This

[2] It should be noted in this connection that the Board does not take evidence on the amount of back pay at its hearing of the unfair labor practice complaint. For obvious reasons (*e.g.*, because the alleged discrimination commonly continues pending decision of the complaint), assessment of

argument, repeating the erroneous idea that the revised formula is designed to treat all cases in some peculiar way as "hardship" cases, adds the further error of denying the Board's power to proceed by general rule rather than *ad hoc* adjudication in solving the problem disposed of in the *Woolworth* decision. In meeting the evil to which the *Woolworth* formula is addressed, there is no reason to confine the Board to case-by-case litigation of the evil's manifestation. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194. On the contrary, the problem is uniquely appropriate for the promulgation of a general rule which will eliminate the incentive to the evil altogether, rather than requiring in each case a trial of the issue whether the reinstatement remedy has been frustrated as it frequently was before the *Woolworth* decision.

Moreover, experience with the *Woolworth* formula since its adoption over two years ago discloses its essential fairness in operation by the reaction of employers to it. Through March 31, 1952, $1,033,000 in back pay, computed in accordance with *Woolworth*, was paid to 2,646 workers. During the same period, some 55 back pay orders

---

back pay is a matter for supplementary hearing after entry of the Board's order and after the party against whom the order is issued has agreed to comply either informally or under court decree. *National Labor Relations Board* v. *Bird Machine Co.*, 174 F. 2d 464 (C.A. 1); *Home Beneficial Life Ins. Co.* v. *National Labor Relations Board*, 172 F. 2d 62 (C.A. 4); *Wallace Corp.* v. *National Labor Relations Board*, 159 F. 2d 952 (C.A. 4); *National Labor Relations Board* v. *New York Merchandise Co.*, 134 F. 2d 949 (C.A. 2).

incorporating this formula came before the courts of appeals. Except for the present case, and one other case in which the employer was represented by the same counsel and which was withdrawn from enforcement for other reasons,[3] there has been no objection raised to the revised method of computation. The absence of substantial protest convincingly demonstrates that employers do not feel they are being required to pay employees more than their due.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

JULY 1952.

[3] *National Labor Relations Board* v. *Pacific Mills*, C.A. 4, No. 6257, 91 N.L.R.B. 60.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*) are as follows:

"UNFAIR LABOR PRACTICES

SEC 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10.

* * * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion

that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE 1982 215092 63

Office - Supreme Court, U.S.
FILED
DEC 4 1952

No. 217

In the Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	3
Argument	8
I. The *Woolworth* formula was devised in order (1) to protect the dischargee's right to reinstatement in the job from which he was illegally discharged; (2) to minimize the benefits which accrue exclusively to the employer who delays offering reinstatement, and (3) to compensate the dischargee as nearly as possible for time lost from work	9
A. The pre-*Woolworth* formula was unsatisfactory in three principal respects	9
B. To remedy these deficiencies the Board found it necessary to devise the *Woolworth* formula	14
II. The Board has the power to compute back pay on the basis of quarterly periods, in order to restore, as effectively and early as possible, the employment relationship which would have obtained but for the employer's discrimination	21
A. The *Woolworth* formula is carefully designed to effectuate the policies of the Act	21
B. In selecting the *Woolworth* formula to restore as effectively and as early as possible the situation which would have existed but for the discrimination, the Board has not exceeded any limitations upon its power to effectuate the policies of the Act	29
Conclusion	44
Appendix	45

CITATIONS

Cases:

Amalgamated Utility Workers Company v. *Edison Company*, 309 U. S. 261	26
Brooklyn Savings Bank v. *O'Neil*, 324 U. S. 697	40
Consolidated Edison Company v. *National Labor Relations Board*, 305 U. S. 197	10
Crossett Lumber Co., 8 NLRB 440	42
E. A. Laboratories, Inc., 80 NLRB 625, modified and enforced, 188 F. 2d 885, certiorari denied, 342 U. S. 871	

Cases—Continued

Page

English Freight Co., 67 NLRB 643, enforced, 152 F. 2d 756 42

International Union of Mine, Mill & Smelter Workers, Local No. 15 v. *Eagle-Picher Mining & Smelting Company*, 325 U. S. 335 38

Nathanson, Trustee v. *National Labor Relations Board*, decided November 10, 1952 ..... 6, 18, 22, 32, 36

National Labor Relations Board v. *Gullett Gin Company*, 340 U. S. 361 22

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 ..... 26, 33, 34

National Labor Relations Board v. *Pacific Mills*, C. A. 4, No. 6257, 91 NLRB 60 34

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, modified and enforced, 91 F. 2d 178, modification reversed, 303 U. S. 261 10

National Licorice Company v. *National Labor Relations Board*, 309 U. S. 350 31

Phelps Dodge Corp. v. *National Labor Relations Board*, 313 U. S. 177 ..... 5, 6, 7, 10, 11, 14, 18, 21, 22, 23, 24, 26, 27, 32, 33, 37, 41

Republic Aviation Corp. v. *National Labor Relations Board*, 324 U. S. 793 39

Republic Steel Corp. v. *National Labor Relations Board*, 311 U. S. 7 ..... 33, 35

Social Security Board v. *Nierotko*, 327 U. S. 358 14

Virginia Electric & Power Co. v. *National Labor Relations Board*, 319 U. S. 533 ..... 6, 21, 22, 32, 33, 37

F. W. Woodworth Company, 90 N.L.R.B. 289, ... 3, 4, 20, 23, 25, 28, 29

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*):

Section 1 45

Section 7 47

Section 8 (a) (3) 47

Section 10 (a) 47

Section 10 (e) 5, 8, 21, 48

64 Stat. 477, 505, 24 U.S.C., Supp. V, 414 14

Miscellaneous:

20 C.F.R. (1949 ed.) 403.201-.202 14

New York State Labor Relations Board, Seventh Annual Report, 1943, p. 20 15

New York State Labor Relations Board, Fourteenth Annual Report, 1950, p. 75 15

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 217

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the Board (R. 38) are reported at 92 NLRB 1622. The opinion of the court below (R. 72) is reported at 196 F. 2d 424.

JURISDICTION

The judgment of the court below was entered on April 29, 1952 (R. 76). A petition for rehearing, filed by the respondent on May 16, 1952, was denied on June 18, 1952 (R. 82). The decree, de-

tailing the terms of the judgment, was entered on July 8, 1952 (R. 84). The petition for a writ of certiorari was granted on October 13, 1952 (R. 89). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Since its decision in *F. W. Woolworth Company*, 90 NLRB 289, the National Labor Relations Board has determined the back pay to which an employee discriminatorily denied employment is entitled by computing the net back pay to which the employee is entitled for each 3-month calendar period and totalling the quarterly net amounts. Under this method of computation, earnings in any quarter which exceed the amount the employee would have earned in the employment from which he was discriminatorily barred are not treated as diminishing the back pay accrued in any other quarter. The question presented is whether the Board may use this method of computing back pay or whether, as the court below held, the Board must use its former method of deducting from the amount the employee would have earned in the job he was discriminatorily denied, during the period of discrimination taken as a whole, the employee's total earnings in other employment for that period.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C.,

Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 45-48.

STATEMENT

The Board found that eleven employees had been discriminatorily denied reemployment by the Company at the end of a strike (R. 39), and ordered their reinstatement with back pay (R. 41). The order directed that back pay "be computed upon a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*," (90 NLRB 289) (June 12, 1950) (R. 41, 60), described in the Question Presented.

On the Board's petition for enforcement, the court below decreed that the entire order be enforced, with the exception of the method prescribed for computing back pay. Denying enforcement to that part of the order which prescribed the *Woolworth* formula, the court below ordered that "the method followed by the Board itself prior to the *Woolworth* case . . . should be followed here" (R. 76).

SUMMARY OF ARGUMENT

I

The method which the National Labor Relations Board had used prior to the *Woolworth* decision in 1950 to compute the back pay due to employees who had been unlawfully discharged was found by the Board to be unsatisfactory in those cases in which the employee obtained interim employment at a wage greater than the wage he would have earned in continuous employment at his original job.

In such cases, the greater wages earned during the interim employment reduced, and sometimes wiped out, the back pay accrued during earlier periods of total unemployment or employment at lower wage rates. When that formula operated in this way, it brought about three undesirable consequences: (1) when the employee obtained a better paying job he was compelled to waive his right to reinstatement in his original job in order to preserve his back pay which had already accrued; (2) if the employee nevertheless clung to his right of reinstatement, the employer would deliberately delay offering reinstatement as long as possible, even after the Board had ordered reinstatement, so as to take advantage of this opportunity to diminish his back pay liability; and (3) if the employee did not relinquish his right of reinstatement, his back pay claim was reduced so that he was not even approximately reimbursed for the wages he would have earned from the discharging employer during the time he lost from work as the result of the employer's illegal discrimination.

The Board concluded that these circumstances were substantially impeding effectuation of the policies of the Act, and undertook a thorough study of the situation with a view to devising a more satisfactory method of computing back pay. From a number of suggestions, the Board selected the *Woolworth* quarterly formula, noting that it would "constitute an appropriate, fair, and practicable method of computation." *F. W. Woolworth Co.*, 90 NLRB 289, 293. Since, under this method of

computation, greater wages in later periods of discrimination no longer reduce the back pay accrued for time lost from work in earlier quarters, the discriminatee is no longer compelled to waive his right to reinstatement in order to preserve his back-pay claim; he is now substantially reimbursed for time actually lost from work; and the employer no longer finds it economically advantageous to delay reinstatement as long as possible.

II

In remedying illegal discrimination, the Board is charged with the duty to require "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act (Section 10(c)). The "effectuation of [these policies] generally require[s] not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194. The Board properly concluded that the shortcomings of the pre-*Woolworth* formula were impeding effectuation of the policies of the Act, for the discriminatee's waiver of his right to reinstatement and the failure adequately to reimburse his losses prevented restoration of the situation which would have existed, and the employer's delay in offering reinstatement unduly postponed that restoration. The Board was acting within the

bounds of the discretion committed to it by Congress when it devised an alternative method for computing back pay, in order better to effectuate the policies of the Act. See *Nathanson, Trustee* v. *National Labor Relations Board*, No. 33, this Term, decided Nov. 10, 1952, slip opinion, pp. 4-5.

In so exercising its discretion to adjust the means to the end, the Board did not exceed any limitations upon its authority to effectuate the policies of the Act. Far from making the employee "more than whole," the *Woolworth* formula does not even adequately reimburse the discriminatee for the time he loses from work as remunerative as that from which he was illegally discharged, for it at most compensates him for no more than that time, without interest or other credit for delay in payment. Of course, this formula does not even attempt to compensate for other losses incurred as the result of the employer's discrimination. In any event, the Board is not fettered by common law principles governing the duty to "make whole" an employee suing for breach of an employment contract (*Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 543), for the "Board * * * does not exist for the 'adjudication of private rights'; it 'acts in a public capacity to give effect to the declared policy of the Act to eliminate and prevent obstructions to interstate commerce' by encouraging collective bargaining.'", *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 193. On the contrary, the Board is enjoined by Congress to compute back pay

in the manner which best effectuates the policies of the Act; the Board would have been derelict in its duty had it not endeavored to devise a formula more satisfactory than the method used prior to the *Woolworth* formula.

Nor can it be said that a back-pay order based upon the *Woolworth* formula is "penal" rather than "remedial," and therefore beyond the Board's authority. Under no circumstances can this formula operate to alter the back-pay liability of an employer who promptly complies with the Act; in such a case, the *Woolworth* formula is no different from the method previously in use. Nor can this formula, under any circumstances, operate to impose upon an employer who delays reinstatement, perpetuating his illegal discrimination, any greater liability than that imposed upon the employer who promptly complies with the Act; rather, this formula merely removes a discrimination which previously existed in favor of the employer who delays reinstatement.

Finally, in suggesting that the Board could better remedy the deficiencies of the pre-*Woolworth* formula by some process of *ad hoc* adjudication, the court below failed to "guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194. Moreover, no process of *ad hoc* adjudication of the sort apparently contemplated by the court below could con-

ceivably achieve the salutary results achieved by the *Woolworth* formula. Such adjudication would not even be addressed to the problem of adequately compensating the discriminatee for loss of equally remunerative working time, or for loss of Social Security credits. Since such adjudication would take place at the unfair labor practice hearing, when the Board decides whether to issue an order of reinstatement, this process could not, as does the *Woolworth* formula, free the discriminatee from the need to waive his right to reinstatement after that hearing, or eliminate the reward which accrues to the employer who delays compliance with the Board's order. Nor could an endless stream of subsequent hearings—hardly feasible in any event—prospectively achieve these results, unless they culminated in an order based upon the *Woolworth* formula.

ARGUMENT

Congress has delegated to the National Labor Relations Board the power to require "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the National Labor Relations] Act," where employees have been discriminatorily denied employment. Section 10 (c). The sole question presented in this case is whether, despite this delegation of power, Congress has withheld from the Board the authority to devise a quarterly formula for computing the back pay due from an employer who has illegally discriminated against and discharged an employee. In Part I of the

succeeding argument, we shall explain the deficiencies of the method of computation previously in use; the manner in which the *Woolworth* quarterly formula remedies those deficiencies, and the reasons why the Board selected the *Woolworth* formula in preference to other possible remedies. In Part II we shall demonstrate that Congress has conferred upon the Board—and exclusively upon the Board—the authority to devise just such a formula in order to protect the exercise by workers of their rights of full freedom of association, of self-organization, and of collective bargaining.

I

The *Woolworth* Formula Was Devised in Order (1) to Protect the Dischargee's Right to Reinstatement in the Job from Which He Was Illegally Discharged; (2) to Minimize the Benefits Which Accrue Exclusively to the Employer Who Delays Offering Reinstatement, and (3) to Compensate the Dischargee as Nearly as Possible for Time Lost from Work

A. THE PRE-*WOOLWORTH* FORMULA WAS UNSATISFACTORY IN THREE PRINCIPAL RESPECTS

Until 1950, the Board had generally computed the net back pay due to an employee who had been discriminatorily discharged in the following manner: (1) by computing the gross back pay which the employer would have paid the dischargee but for the discrimination, from the time of the discrimination to either the employer's offer of reinstatement or the employee's waiver of reinstatement, whichever came first, and (2) by subtracting from this amount the net interim earnings of the dis-

chargee during that same period.[1] Under this formula, it is apparent that when, after a period of unemployment, the discriminatee secured employment at a higher wage, and so long as he remained in that employment, he materially reduced the amount of back pay which would have accrued to him to compensate him for the time when he was unemployed. This reduction resulted from deducting the greater earnings in the later interim periods from the back pay accrued in the earlier periods of unemployment or employment at a lesser wage. In many cases, indeed, the later earnings wiped out this accrued back pay altogether.

From 1934 to 1940 this circumstance attracted little attention, for interim employment at a higher wage than would have been earned in continuous employment was not common. Beginning about 1940, however, the increasing demand for labor made such interim employment more frequently available, and the Board became increasingly concerned with this problem. After observing for several years, during which the labor market was tightening and wages generally were rising, the effects on compliance with Board orders of the prevalence of better paying interim jobs, the Board concluded that when back pay was computed according to a formula which permits greater earnings

[1] This formula was adopted in the Board's first decision, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, modified and enforced, 91 F. 2d 178 (C.A. 3), modification reversed, 303 U.S. 261, although the concept of "net interim earnings" was not introduced until 1938, in *Crossett Lumber Co.*, 8 NLRB 440, 500. See *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198, n. 7.

in later interim periods to diminish or wipe out the back pay accrued in earlier periods of unemployment or employment at a lesser wage, the back-pay order fails in three chief respects to accomplish its objective of restoring as effectively and as early as possible the situation "which would have obtained but for the illegal discrimination" *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194.

1. When a better paying job than the one from which he had been discriminatorily discharged presented itself, the dischargee was confronted with a dilemma. Regardless of his preference, he was compelled by immediate economic necessity to take the new job. Further, he knew that if he wilfully refused the new job, the back pay which might ultimately be awarded him would be reduced by the amount which he could have earned at the new job. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 199-200. If he took this new job, however, under the pre-*Woolworth* formula his greater earnings reduced and ultimately wiped out the back pay due him for the working time already lost. If he wished to prevent this loss, the only course was to give up his right to reinstatement in the job from which he was illegally discharged. In that event, the back pay would be computed only for the intervening unemployment period, without regard to any later wages.

2. When the employer who had discriminatorily discharged an employee knew or suspected that

the dischargee had found or would soon find a better paying job, he found it financially advantageous to perpetuate his discrimination and delay reinstatement as long as possible, for, under the pre-*Woolworth* formula, each day reduced the employer's back pay liability. This situation most commonly arose after the employer was aware that he had committed an unfair labor practice, or that the Board was conducting an investigation. At that time, it profited the employer to look about to see the status of the employees who had been discharged and to delay reinstatement accordingly. Even after the Board had ordered reinstatement, and the order had been enforced by the courts, the employer found it profitable to prolong negotiations and delay a settlement as long as possible.[2]

3. While in theory the dischargee under the pre-*Woolworth* formula ultimately received a sum equal to that which he would have received had no

---

[2] A report prepared by the Board's staff in 1946 notes the following example: In one case, the Board's order, as enforced in 1945, required reinstatement of 171 employees with back pay beginning in 1937. The Company has as yet made only incomplete offers of reinstatement and has taken no steps to comply with the back pay provisions of the order; only recently did it agree to permit the Board's agents to microfilm its records preparatory to beginning back pay computations. The following statement by the Board analyst assigned to the case is significant:

> ". . . the Union and the Company are in agreement on one point: namely, there is little net back pay in this case if back pay is computed on a total period basis. The Company attorney stated that 'several years ago he offered to settle the case for $25,000 but that he felt now . . . the company owed only a few thousand dollars' and 'that he thought little if any net back pay was due because of high earnings of the claimants during the war years'."

discrimination occurred, the losses which he suffered during the period when he was unemployed and without income were not fully compensated. It is by no means unusual for an employee who is without work for a considerable period to be forced to exhaust his savings, if any; to forego installment payments on such items as insurance, chattels, and home, possibly losing all of them; and to fail to provide his family with proper medical care and other necessities. These losses are not fully compensated where the employee, months or years later, earns more money than he would have earned if he had continued throughout to work for the employer who initially discharged him. Yet, under the pre-*Woolworth* formula, greater earnings in subsequent periods often resulted in total elimination of back pay, thereby eliminating all compensation for time actually lost from work.[3]

Further, under the pre-*Woolworth* formula the discriminatee in some cases received no compensation whatever for the loss of credits to his Social Security account. Eligibility for insurance status depends not upon the amount of earnings credited to the employee (except for a minimum quarterly amount), but upon the number of quarters of cov-

[3] An analysis of this problem, prepared for the Board by its staff in 1946, listed the following as examples of claimants who were unemployed for part of the back-pay period but received little or no back pay:

Case	Claimant	Length of Back-Pay Period	Length of Back-Pay Unemployment	Gross Back Pay	Net Back Pay
Wilson & Co., C-1551	Remski, S.	21 mos.	8 mos.	$2,485.49	$ 87.61
	Culotta, A.	18 mos.	8 mos.	1,668.36	150.64
Remington-Rand, C-145	Greenleaf	45 mos.	14 mos.	8,472.79	853.26
	Peiffer	42 mos.	7 mos.	8,004.15	0

ered employment.[4] Quarters for which back pay is in fact awarded are included within this definition, and the Social Security Board must allocate the back pay over the appropriate quarters to provide appropriate coverage. *Social Security Board* v. *Nierotko*, 327 U.S. 358, 370. However, when the gross back pay attributable to a period of unemployment is entirely wiped out by greater earnings in other quarters than the employee would have enjoyed in those quarters in his original employment, there is no back pay to allocate to quarters in which the discriminatee is entirely unemployed, and he loses all Social Security credit for those quarters.

B. TO REMEDY THESE DEFICIENCIES THE BOARD FOUND IT NECESSARY TO DEVISE THE *WOOLWORTH* FORMULA

To remedy the observed deficiencies in the operation of the formula the Board considered a number of alternative approaches including the following:

1. To award the dischargee his gross back pay, ignoring interim earnings entirely in all cases. This proposal would impose upon the employer a greater liability and confer upon the discriminatee a greater benefit than was thought necessary to remedy the employer's unfair labor practice. Accordingly, it would probably not be acceptable under *Phelps Dodge, supra.*

2. To compute back pay only for those periods in which the dischargee is unemployed or employed at a lesser wage than he would have earned in his

---

[4] 64 Stat. 477, 505, 42 U.S.C., Supp. V, 414. See also, 20 C.F.R. (1949 ed.) 403.201-202.

previous job, ignoring those periods when he is working at a greater wage. This proposal strikes directly at the cause of the shortcomings of the pre-*Woolworth* formula, measuring back pay by time actually lost from equally remunerative work, and is therefore theoretically desirable. However, it would be extremely complicated to apply because of the lack of detailed information concerning the precise periods and amounts actually earned by the dischargee (see p. 17, *infra*).

3. To compute back pay only from the time of the discrimination to the time of the employer's offer of reinstatement or to the date when the dischargee obtains a better paying job, whichever is first. This is the formula selected by the New York State Labor Relations Board. See Seventh Annual Report of the New York State Labor Relations Board, 1943, p. 20; Fourteenth Annual Report of the same agency, 1950, p. 75.[5] This formula differs from the preceding one only in that it is administratively somewhat less complicated and in that it deprives the discriminatee who has obtained a short-term better paying job of any back pay for subsequent periods during which the employer still refuses to offer reinstatement. This formula pre-

[5] These reports do not indicate any further refinements in the operation of this formula. However, a letter to the General Counsel of the National Labor Relations Board from A. M. Goldberg, Acting Executive Secretary of the New York State Labor Relations Board, dated August 11, 1952, indicates that if the problem arises, some effort may be made to compensate the dischargee for periods of unemployment occurring after his better paying job terminates, but before the employer offers reinstatement. If this is done, the New York formula would be more closely analogous to the second formula suggested above.

sented a feasible, but unsatisfactory, compromise.

4. To divide the back-pay computation into two periods: (1) from the date of discrimination to the date of the Board's order of reinstatement, and (2) from that date to the employer's offer of reinstatement. Under this formula, greater earnings in the second period would not offset back pay accrued in the first period; consequently, the employer would seldom be encouraged to delay compliance with the Board's order. However, this formula would remedy the other shortcomings of the pre-*Woolworth* formula only insubstantially, if at all.

5. To divide the back-pay computation into fixed periods in either of two ways.

A. To divide the back-pay computation into payroll periods, crediting greater interim earnings in any given payroll period only against wages the dischargee would have earned in that period. This formula very nearly approaches the abstract justice of the second formula suggested above, in that it very nearly compensates the discriminatee for time actually lost from work, and at first glance it seems eminently desirable. Careful study, however, demonstrated that it was impracticable. First, the basic difficulty in the use of the payroll period is that of allocating the employee's interim earnings to the payroll periods of the employer who discriminatorily discharged him, for usually the two employers will not use exactly the same payroll periods. Even the simplest sort of case would require an immense amount of paper work to adjust the two periods. And this allocation would become

a staggering task—an invitation to endless controversy—when to the simple case are added the complications of shift schedules, overtime payments, production bonuses, deferred incentive payments, piece rates, and the like. Second, as a practical matter, the information necessary to compute the interim earnings on a payroll period basis is not available. The Social Security Board (the chief source of the Board's information in computing back pay) has data only for quarterly periods. The dischargees themselves have shown their memories to be highly unreliable, as is only to be expected when it is realized that the information required may date back many years, and may involve many forms of employment with many different interim employers. The interim employers are generally rather unwilling to compile the necessary data themselves. Although this information could theoretically be obtained through the issuance of prehearing subpoenas (a practice which the Board does not normally employ), it is hardly feasible to send investigators equipped with such subpenas to the offices of all the interim employers all over the country who may have become involved in any particular case.[6]

---

[6] The court below observed: "The employees here involved were not compensated on a quarterly basis" (R. 76). Apparently implicit in this observation is the assumption that a formula based upon payroll periods would be valid. If the gist of the decision below is that a quarterly formula is unreasonable or capricious by comparison with a formula based upon payroll periods, we respectfully submit that the court below not only overlooked the significance of the considerations noted above, but also failed to "guard against the danger of sliding unconsciously from the narrow confines of law into

B. To divide the back-pay computation into quarterly periods, crediting greater interim earnings in any given quarter only against wages the dischargee would have earned in that quarter. This formula, unlike the first one suggested above, does not alter the employer's back-pay liability in those cases where the dischargee finds no interim employment, or finds interim employment at a wage no greater than he would have earned but for the discrimination. As shown by the illustrations in the table on the opposite page this formula reaches a different result from the pre-*Woolworth* formula only in a case where the dischargee eventually finds employment at a wage greater than he would have earned. Being directed only at that sort of case, this formula substantially remedies the shortcomings of the pre-*Woolworth* formula without altering the back-pay computation in those cases where the old formula was satisfactory. This formula offers the employer much of the advantage previously derived from the dischargee's greater earnings, but does not offer a premium for delay in

---

the more spacious domain of policy." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194. See also *Nathanson, Trustee*, v. *National Labor Relations Board*, No. 33, this Term, decided Nov. 10, 1952, slip opinion, pp. 4-5.

Assume that an employee is discriminatorily discharged on December 31 from a job at which he earns an average of $100 per month, and is offered reinstatement on the following July 1. The table below illustrates the operation of the *Woolworth* formula.

Period of Unemployment	Gross Back Pay	Interim Earnings	Net Back Pay	
			Pre-*Woolworth*	*Woolworth*
CASE I				
The dischargee finds no interim employment.				
First Quarter	$300	0	....	$300
Second Quarter	$300	0	....	$300
Total	$600	0	$600	$600
CASE II				
The dischargee finds interim employment at no greater wage than he would have earned but for the discrimination.				
First Quarter	$300	0	....	$300
Second Quarter	$300	$300	....	0
Total	$600	$300	$300	$300
CASE III				
The dischargee finds interim employment at a greater wage than he would have earned but for the discrimination.				
First Quarter	$300	0	....	$300
Second Quarter	$300	$400	....	0
Total	$600	$400	$200	$300

reinstatement; if the employer perpetuates his discrimination after the discriminatee finds a better job, he will be liable for just as much—but no less, and of course no more—back pay for past quarters as will the employer who more promptly terminates his discrimination and offers reinstatement. Since greater earnings will not offset back pay accrued in previous quarters, the dischargee is no longer compelled to waive his right to reinstatement in the job from which he was illegally discharged. Finally, this formula substantially restores to the dischargee the real wages which he has lost as a result of the employer's discrimination, and he receives full credit for quarters covered by Social Security. All this is achieved in a simple, workable manner, for the data on which back-pay computations are based is obtained from the Social Security Board in terms of quarterly periods.

The Board studied thoroughly the various reports and recommendations submitted by its staff, and finally in 1950 selected this latter, quarterly formula for general use, noting that it would "constitute an appropriate, fair, and practicable method of computation." *F. W. Woolworth Co.*, 90 NLRB 289, 293.

II

The Board Has the Power to Compute Back Pay on the Basis of Quarterly Periods, in Order to Restore, as Effectively and Early as Possible, the Employment Relationship Which Would Have Obtained But for the Employer's Discrimination

A. THE *WOOLWORTH* FORMULA IS CAREFULLY DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT

Congress has imposed upon the Board the authority, and the duty, when it finds that an employer has discriminatorily discharged an employee, to order the employer "to take such affirmative action including reinstatement with or without back pay, as will effectuate the policies" of the Act (Section 10(c)). "The declared policy of the Act in Section 1 is to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest. See *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 539. "According to the experience revealed by the Board's decisions, the effectuation of this important policy generally requires not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194.

In selecting the appropriate remedy for a given unfair labor practice, the Board is not bound to choose that which may subsequently appear most desirable to the courts. "Because the relation of remedy to policy is peculiarly a matter for administrative competence," *Phelps Dodge Corp.* v. *National Labor Relations Board, supra,* at 194, the wisdom of the Board's selection may not be put in issue before the courts. See *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 363; *Nathanson, Trustee* v. *National Labor Relations Board,* No. 33, this Term, decided Nov. 10, 1952, slip opinion, p. 5. The foregoing pages demonstrate that the Board, in devising the *Woolworth* formula, has over a period of many years studied thoroughly what it regarded as the defects of the pre-*Woolworth* formula, has considered extensively all the possible remedies for those defects, and has exercised its best judgment in selecting the formula best designed to achieve a fair and workable compromise among all the competing interests. This "administrative determination . . . should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *National Labor Relations Board, supra,* at 540.

There is no such showing here. On the contrary, the foregoing explanation demonstrates that this order, like the order of reinstatement upheld in *Phelps Dodge Corp.* v. *National Labor Relations Board, supra,* at 194, is designed solely for the pur-

pose of restoring, as effectively and as early as possible, the normal employment relationship which would have obtained but for the illegal discrimination.

The Board's basic reason for changing the method of computing back pay was that the prior method of computation was undermining and frustrating the equally important remedy of reinstatement. Under the pre-*Woolworth* formula whenever an employee began to earn more than he would have earned in the position from which he had been discriminatorily discharged he was faced with the dilemma of either watching his already accumulated back-pay claim steadily decrease or waiving his right to reinstatement. As the Board observed, *F. W. Woolworth Co.*, 90 NLRB 289, 292, the severe economic detriment sustained by an employee during unemployment (particularly when prices are rising), which cannot be truly compensated by increased earnings over a future and protracted period, all too often induced employees to follow the latter course. The former method of computing back pay was thus tending to transform the concomitant remedies of "reinstatement with * * * back pay" into alternative and mutually exclusive remedies.

This Court has recognized, in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 193-194, that reinstatement *with* back pay is indispensable to undo the effects of discrimination:

> * * * to limit the significance of discrimination merely to questions of monetary loss to

> workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization. * * *
>
> * * * * *
>
> * * * According to the experience revealed by the Board's decisions, the effectuation of this important policy generally requires *not only compensation for the loss of wages but also offers of employment to the victims of discrimination.* Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. [Italics added.]

The discriminatee's right to reinstatement was considered so important in that case that a decree of reinstatement was upheld even though the dischargee had already obtained substantially equivalent employment elsewhere, for it is essential to return the dischargees "to the jobs of their choice." *Phelps Dodge Corp.* v. *National Labor Relations Board, supra,* at 200. The opportunity to make this choice between the original employment and new employment must be free from coercion, for a coerced waiver is no choice at all. Therefore, when its experience showed that the former method of computing back pay was actually compelling discriminatees to waive their right to reinstatement it was plainly proper for the Board to adjust the means of computation to remove, in part, this coercive aspect of the pre-*Woolworth* formula. In thus

correlating its back-pay order with the companion remedy of reinstatement the Board was simply seeking to restore more effectively the situation which would have obtained but for the discrimination. See *F. W. Woolworth Co.*, 90 NLRB 289, 292.

A second objective of the Board in devising the *Woolworth* formula was to avoid rewarding the employer who perpetuates his discrimination for a substantial time. As we have seen (pp. 11-12, *supra*), when the dischargee secured interim employment at a higher wage, the pre-*Woolworth* formula operated to reduce the employer's back-pay liability so long as he refused to offer reinstatement. The Board's experience showed that employers commonly delayed reinstatement as long as possible in order to take advantage of this windfall. Thus that formula, by its very nature, operated to postpone indefinitely achievement of the Board's primary objective—the restoration, as nearly as possible, of the situation which would have existed but for the discrimination. Convinced that its efforts to effectuate the policies of the Act were being in large measure undermined, the Board devised the *Woolworth* quarterly formula to eliminate this windfall. See *F. W. Woolworth Co.*, 90 NLRB 289, 292. Since greater interim earnings no longer cancel out back pay accrued for time lost in earlier quarters, the employer no longer derives a substantial advantage from perpetuating his discrimination, and the back-pay order no longer operates to postpone a restoration of the employment relationship.

A third objective of the Board in devising the *Woolworth* formula was to reimburse the dischargee as effectively as possible for the losses which he has incurred as a result of the employer's discrimination. "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 197. Only one of these losses—the loss of working time—can be measured even approximately in terms of money; to redress this loss the Board has from the beginning "directed the payment of wages for the time lost" from work. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48.

To be sure, the subsequent reimbursement of wages which would have been paid during the time lost from work does not entirely redress this loss, for "the failure to pay . . . . on time may be so detrimental to the maintenance of the minimum standard of living 'necessary for health, efficiency and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being." *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 707. Reluctant to enter this area of speculation, however, the Board has ignored the element of delay in awarding back pay,[7] confining

[7] The Board does not generally order interest on back-pay awards.

itself to an effort to restore to the discriminatee the back pay which he would have earned during the time which he lost from work.

As we have shown, under the pre-*Woolworth* formula the Board's back-pay orders fell short of this goal in a case where the dischargee, after a period of unemployment, secured employment at a higher wage than the wage he was earning at the job from which he was discriminatorily discharged. This shortcoming is simply illustrated by the example given in Case III, p. 19, *supra*: although the dischargee loses 3 entire months of work, during which he would have earned $300 from the employer who was guilty of the unfair labor practice, the pre-*Woolworth* formula awarded him only $200. Even this amount would be continually diminished as long as the discrimination endures. Thus, the "policy of promoting production and employment" (*Phelps Dodge Corp.* v. *National Labor Relations Board, supra*, at 200) "weaken[ed] the enforcement of the policies of the Act by exerting coercion against men who have been unfairly denied employment to take employment elsewhere and later, because of their new employment [at greater wages], declaring them barred from" recovering the back pay to which they were entitled for time lost from equally remunerative work. In the *Phelps Dodge* case, this Court refused to permit such a paradoxical interpretation of the Act to bar the dischargees from returning to the jobs of their choice. In line with that decision, the Board devised the *Woolworth* formula to pre-

vent the same paradox from barring the dischargees from receiving back pay for time already lost from equally remunerative work. See *F. W. Woolworth Co.*, 90 NLRB 289, 292.

The dischargee in Case III now recovers the full $300 which he would have earned in the time which he lost from work as the result of the employer's unfair labor practice; since subsequent earnings are not deducted from back pay accrued for time lost in earlier quarters, the discriminatee is substantially (although, of course, not entirely) reimbursed in monetary terms for the time lost from work.

Another loss which can be restored by the Board, although it cannot feasibly be measured in terms of money, is the loss of Social Security credits suffered by a dischargee when his back pay is wiped out, under the pre-*Woolworth* formula, by subsequent earnings. As we have shown (pp. 13-14, *supra*), when gross back pay was altogether wiped out by interim earnings, as was sometimes the case, the Social Security credit for any quarter in which the employee was entirely unemployed was also wiped out. The worker's right to Social Security coverage can be effectively protected against the employer's illegal discrimination only by dividing the back-pay computation into periods as small as quarters, thereby insuring coverage for every quarter to which the workers are entitled to coverage. It was partly in an effort to reinstate full Social Security coverage, in order better to effectuate the policies of the Act, that the Board devised

the *Woolworth* formula. See *F. W. Woolworth Co.*, 90 NLRB 289, 293.

B. IN SELECTING THE *WOOLWORTH* FORMULA TO RESTORE AS EFFECTIVELY AND AS EARLY AS POSSIBLE THE SITUATION WHICH WOULD HAVE EXISTED BUT FOR THE DISCRIMINATION, THE BOARD HAS NOT EXCEEDED ANY LIMITATIONS UPON ITS POWER TO EFFECTUATE THE POLICIES OF THE ACT

In respondent's brief and in the opinion below, there appear suggestions that the Board may have exceeded various limitations upon its power to effectuate the policies of the Act. These suggestions derive from an erroneous conception of the Board's duties in administering the Act, and of the Board's reasons for devising the *Woolworth* formula.

1. In setting aside the Board's selection of the *Woolworth* formula, the court below observed: "The employee is entitled to be made whole, but no more" (R. 76). Apparently implicit in this observation is a theory that (1) the *Woolworth* formula makes the employee "more than whole," and (2) the Board's remedial power is exhausted when the employee's monetary losses have been restored, so that the Board must disregard the probable effect upon the concomitant remedy of reinstatement of one rather than another formula for computing losses.

The first step of this theory seems to rest on the assumption that the sole appropriate basis for measuring the loss sustained by the dischargee is the over-all period from the date discrimination begins to the date discrimination ends. The fallacy

of this assumption has already been made clear, at pp. 27 to 29, *supra*. Eligibility for Social Security benefits, for example, is lost in terms of calendar quarters, not in terms of periods of discrimination; this eligibility can be restored only if back pay is computed in terms of units as small as quarters. With respect to money, what the discriminatee loses as the result of his illegal discharge are the wages for the precise periods of time, *i.e.*, hours, weeks, months, during which he has been unemployed or employed at lower wage rates—not the money he would have earned in the discharging employer's service during the entire period of discrimination. Actually, this loss can be measured accurately only in terms of precise periods of unemployment or employment at a lesser wage rate—not in terms of the total period of discrimination. If the Act could be construed to restrict the Board to any one method of computing back pay, therefore, it would be a formula based upon those periods, as is the second formula described at page 14, *supra*. Under such a method of periodic calculation, the employer would fare far worse than under the *Woolworth* formula. However, the Board is not restricted to the use of such impractical formulae any more than to the use of unfair ones, such as the pre-*Woolworth* formula; hence, the Board has devised a workable quarterly formula which substantially restores to the dischargee the wages he would have earned during the periods he was unemployed or employed at a lower wage rate.

Far more serious, however, than this failure to

comprehend the economic plight of the discriminatee is the illusion that the Board's remedial power is exhausted when the dischargee's monetary losses have been restored. The view of the court below is illustrated by the observation that under the *Woolworth* formula "it would frequently result that the suspended employee would receive more in back pay * * * than he would have earned in uninterrupted employment" (R. 75). By the same token, under the pre-*Woolworth* formula it frequently resulted that the employer who discriminated would pay *less* in back pay than he would have paid the discriminatee in uninterrupted employment. Indeed, this is still true of the *Woolworth* formula. Does it follow that neither formula is valid? Does it follow that no formula can ever be valid?

The fallacy of this word play lies in its premise that the financial status of the employee or of the employer is an end in itself. On the contrary, the Board is concerned with altering the financial status of either party only to the extent that such alteration is a means to the ultimate end of effectuating the policies of the Act, by restoring the situation which would have existed but for the discrimination. This Court has emphasized time and again that "[t]he Board [does not exist] for the adjudication of private rights; [it] acts in a public capacity to give effect to the declared policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining." *National Licorice Co.* v. *National Labor*

Relations Board, 309 U.S. 350, 362; *Nathanson, Trustee* v. *National Labor Relations Board*, No. 33, this Term, decided Nov. 10, 1952. And see *Amalgamated Utility Workers* v. *Edison Co.*, 309 U.S. 261, "[T]o limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 193. The back-pay order is a "remed[y] created by statute . . . designed to aid in achieving the elimination of industrial conflict. [It] vindicates public, not private rights." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 543.

These public rights are best vindicated by "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194. Restoration of the financial status of the employee is, of course, one aspect of that situation, but only one. We have explained above that the *Woolworth* formula is designed to protect as well his right to reinstatement in the job from which he was illegally discharged, when the Board prescribes that remedy, and to avoid rewarding the employer who frustrates effectuation of that remedy by delaying reinstatement. In fashioning the remedy of back pay to achieve these objectives the Board's discretion is not to be fettered by conventional common

law or chancery principles relating to the duty to "make whole" those who suffer private grievances. *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U.S. 533, 543. See also, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 48-49. "The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 198. The Act authorizes the Board to award "back pay" in order to restore the status quo, not to "make whole" the employee in order to redress his private grievances. Whatever might be the common law formulae for computing damages for breach of an employment contract, those formulae are not incorporated into the statutory phrase "back pay." That phrase introduces a new, statutory concept of an award to be computed by whatever method the Board finds will most satisfactorily effectuate the policies of the Act.

2. Respondent further suggests that a back-pay order computed under the *Woolworth* formula is of a "penal" rather than a "remedial" character, and is therefore beyond the scope of the Board's authority, citing *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U.S. 7, 11-12. Why this is so does not appear. Surely the *Woolworth* formula cannot result in any substantial hardship

to the employer. His back-pay liability is, under all circumstances, limited by the amount which he would have paid the employee but for his own illegal discrimination.[8] Moreover, in this regard the *Woolworth* formula adds no special liability for any employer; it merely removes a discrimination in favor of the employers who perpetuate their violations for the longest time. To illustrate this point, we refer again to the hypothesis of Case III, p. 19, *supra,* in which case the dischargee has no interim earnings in the first quarter, but in the second quarter has interim earnings in excess of his previous wage. Suppose Employer A offers reinstatement at the end of the first quarter: his back-pay liability is $300. Suppose Employer B delays reinstatement through the second quarter. Under the pre-*Woolworth* formula, his back-pay liability would have been only $200. If the $300 liability for Employer A is "remedial" and valid (*National Labor Relations Board* v. *Jones & Laughlin Steel*

---

[8] Experience with the *Woolworth* formula since its adoption over 2 years ago discloses its essential fairness in operation by the reaction of employers to it. Through March 31, 1952, $1,033,000 in back pay, computed in accordance with *Woolworth*, was paid to 26,646 workers. During the same period, some 55 back-pay orders incorporating this formula came before the courts of appeals. Except for the present case, and one other case in which the employer was represented by the same counsel and which was withdrawn from enforcement for other reasons, *National Labor Relations Board* v. *Pacific Mills*, C.A. 4, No. 6257, 91 NLRB 60, prior to the decision below no objection had been raised to the revised method of computation. The absence of substantial protest convincingly demonstrates that employers do not feel they are being required to pay employees more than their due.

Corp., 301 U.S. 1, 48-49), it is not easy to understand why a formula imposing no more than the same liability on Employer B is "penal" and invalid.

To lend this argument some color respondent relies upon the Board's explanation of one of its reasons for selecting the *Woolworth* formula—to eliminate the reward which accrues to the employer who perpetuates his discrimination for the longest time. It is true that the Board may not add to the employer's liabilities simply to discourage future violations. *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, 12. In selecting the *Woolworth* formula, however, the Board did not impose upon the employer an additional liability; the Board merely prescribed an alternative formula for computing the back pay which is concededly due, in order more effectively to "achieve the remedial objectives which the Act sets forth." *Ibid.* In devising a method for computing back pay, the Board would be derelict in its duty if it gave no weight to the desirability of effectuating this purpose as soon as possible, by withholding the premium which the former method placed upon the employer's persistence in illegal discrimination.

3. Finally, the court below apparently thought that the deficiencies of the pre-*Woolworth* formula could be better remedied on an *ad hoc* basis (see R. 76). The suggestion apparently contemplates that evidence be taken in each unfair labor practice hearing to show whether the discriminatee has

waived his right to reinstatement in order to preserve his accumulated back pay, or whether the employer has delayed reinstatement for the purpose of reducing his back pay liability, and that an affirmative finding on either of these points would support some further remedial order by the Board. There are several answers. First, it is contrary to the Board's settled practice, as approved by this Court, to take evidence concerning back pay at the unfair labor practice hearing. "At the time an order of the Board is enforced the amount of back pay is often not computed. [9] Once an enforcement order issues the Board must work out the details of the back pay that is due and the reinstatement of employees that has been directed. This may be done by negotiation; or it may have to be done in a proceeding before the Board. The computation of the amount due may not be a simple matter." *Nathanson* v. *National Labor Relations Board*, No. 33, this Term, decided Nov. 10, 1952, slip opinion, p. 4. To inject the difficulties of back pay computation into the unfair labor practice hearing would add a complication which is at best unnecessary, for that evidence could be heard as well at the back pay hearing. Further, it is often entirely wasted, for an overwhelming majority of cases are settled without a hearing on back pay, after the Board's order is enforced.

Second, assuming, *arguendo*, that courts would deem it preferable to take the evidence at an unfair

---

[9] As a matter of fact, the amount of back pay is rarely, if ever, computed before the Board's order is enforced.

labor practice hearing, this is not sufficient to warrant displacement of the Board's choice. "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194. See also, *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 539-540.

Third, as we have shown above (p. 13), the court below was misguided in its assumption that the pre-*Woolworth* formula adequately compensated the discriminatee for time lost from work.

Fourth, the suggestion was apparently offered without appreciation of the difficulties of *ad hoc* adjudication of these issues. Aside from the difficulty of proving the motives underlying a waiver or delay in offering reinstatement, the salient point is that there is often no opportunity to prove them in the manner envisioned by the court below. The court requires that a pre-*Woolworth* type of order be used unless "a hardship case" is made out at the unfair labor practice hearing (R. 76). Frequently, however, it is not until after that hearing, or even after a decree of enforcement, that the dischargee will obtain a better paying job, presenting the problems which concern the Board. Thus, the "hardship case" often does not even come into existence until after the court enters a decree en-

forcing the pre-*Woolworth* back-pay order—and then, of course, the decree cannot be amended. *International Union of Mine, Mill and Smelter Workers, Local No. 15* v. *Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335. The decree of the court below, enforcing a pre-*Woolworth* order, flatly precludes the Board from "decid[ing] on its own facts" any "hardship case" where the "hardship" arises after entry of the Board's order.

If this point had been clear to the court below, perhaps it would not have insisted on use of the pre-*Woolworth* formula, but would instead have remanded the proceedings to the Board so that the Board could, if it desired, "frame an order which by its terms required modification" (*Eagle-Picher* case, *supra*, at 341) in the event that a "hardship case" should appear at a subsequent hearing. The *ad hoc* adjudication suggested by the court below would thus require at least two hearings on the question of "hardship": one at the unfair labor practice hearing and another after the employer finally offers reinstatement. Such a process could also require an unlimited number of other hearings, for the employer may refuse to offer reinstatement on the ground that a new "waiver," not yet litigated in terms of "hardship," relieves him of the obligation to make such an offer. It is not easy to discern the merit in a system of *ad hoc* adjudication which requires at least two, and possibly many more, necessarily incomplete hearings on the same issue concerning different periods of time. The Board can hardly be charged with caprice in

exercising its unquestioned authority to formulate a general rule to eliminate altogether the dischargee's need to waive reinstatement and the employer's advantage in delaying reinstatement. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793. In applying such a rule, the Board need not hold hearings in each case to prove in an adversary proceeding that the employer's unfair labor practice would inevitably give rise to these evils. The "requirement [of an adversary proceeding] does not go beyond the production of evidential facts [to prove the employer's violation of the Act], and compel evidence as to the results which may flow from such facts. *Market Street R. Co.* v. *Railroad Comm'n*, 324 U.S. 548, 559. An administrative agency with power after hearings to determine * * * whether violations of statutory commands have occurred may infer within the limits of the inqury from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. *Labor Board* v. *Virginia Power Co.*, 314 U.S. 469, 479; *Labor Board* v. *Hearst Publications*, 322 U.S. 111, 130." *Republic Aviation Corp.* v. *National Labor Relations Board*, *supra*, at 800.

Fifth, to confine the Board to the *ad hoc* processes apparently contemplated by the court below

would prevent the Board from affirmatively protecting the discriminatee against the need to waive reinstatement and from eliminating the reward which accrues to the employer who delays reinstatement. The court below apparently contemplates that when it is found that an employer has perpetuated his discrimination solely, or perhaps partly, for the purpose of reducing his back-pay liability, the Board might impose some further sanction. But what? Presumably in such a case the court would sustain something in the nature of a back-pay order based upon the *Woolworth* formula. If this sanction is appropriate, however, for an employer who delays reinstatement for economic motives, one cannot easily comprehend why the general application of the *Woolworth* formula is unduly severe for an employer who delays reinstatement because of an antiunion animus. The incongruity of this position emphasizes the fundamental misconception of the court below. The Board is not concerned with punishing employers because of the reasons for their discrimination; rather the Board is concerned with "avoiding the consequences of violation [of the Act] where those consequences are of a kind to thwart the purposes of the Act," *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 236. One of the consequences of the employer's discrimination under the pre-*Woolworth* formula, as we have shown above (pp. 11-12), was that when the dischargee obtained a better paying job the employer found it economically advantageous to per-

petuate his discrimination, thereby postponing the reinstatement which is required to effectuate the policies of the Act. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194. This advantage cannot be removed by any *ad hoc* sanctions imposed after the fact, for the employer has much to gain and little (or, if the sanction is no more severe than the *Woolworth* formula, nothing) to lose by delaying reinstatement and gambling on the difficulty of proving at a subsequent hearing the motivation for his delay. The *Woolworth* formula, on the other hand, substantially eliminates the employer's incentive to delay reinstatement. To suggest that the Board might accomplish some lesser objective in another way, after holding additional hearings, is not to suggest that the Board's selection of the *Woolworth* formula was less than reasonable.

The court below apparently contemplates that when it is found that the dischargee has been compelled to waive his right to reinstatement in order to preserve his accrued back pay, some further order might be issued by the Board. But one can only guess what sort of *ad hoc* remedies the court below might suggest. The only possibility which can be inferred from the opinion is that in some (or perhaps all) cases the Board might hold the discriminatee's waiver of his right to reinstatement to be invalid for some or all purposes.

It might be suggested that the waiver of reinstatement be disregarded by the Board only for the purpose of ordering reinstatement, and be re-

garded as sufficient to toll the running of back pay. Whatever advantages such a rule may be expected to bring to the discriminatee, the expectation clearly rests on the presumption that dischargees generally are sufficiently learned and sophisticated to understand these subtle effects of of the waiver, and to take advantage of the rule by executing a half-meaningless waiver at precisely the right moment. One cannot seriously urge that the Board would be acting irrationally in rejecting this picture of the average dischargee, and in seeking a more effective method of protecting the rights of self-organization.[10] This suggested rule, moreover, fails to preserve for even the most sophisticated dischargee his freedom to choose between jobs. In order to preserve his right to reinstatement, he must renounce his half-waiver at or before the unfair labor practice hearing, for otherwise the Board will not order reinstatement. E.g., *E. A. Laboratories, Inc.*, 80 NLRB 625, 627, modified and enforced, 188 F. 2d 885 (C.A. 2), certiorari denied, 342 U.S. 871. At the time of the renunciation, the dischargee's back pay again starts running, and, before the *Woolworth* formula, his

[10] With respect to waivers made before the unfair labor practice hearing, the Board has in fact followed a related practice for many years. If the dischargee removes himself from the employer's labor market by waiving reinstatement prior to the unfair labor practice hearing, he may renounce the waiver at the hearing, but the running of back pay is tolled from the time of the waiver to the time of the renunciation. E.g., *English Freight Co.*, 67 NLRB 643, 643-644, enforced, 152 F. 2d 756 (C.A. 5). As shown in the text, however, this rule cannot protect the dischargee from the need to waive reinstatement after the unfair labor practice hearing.

earnings from the time of the renunciation to the time of the employer's actual compliance with the order of reinstatement would cancel out the back pay accrued for time previously lost from work because of the employer's illegal discrimination. This suggested rule therefore offers the discriminatee no real protection, for he is still compelled to waive his right to reinstatement at or after the hearing, in order to protect his accrued back pay.[11]

It may be that the court below assumed that the reason for waivers made after the unfair labor practice hearing might be the subject of further hearings. But then the Board would be overwhelmed with a flood of useless hearings. The only way to stop the flow of these hearings is to eliminate the need for such waivers, by computing back pay in a manner which prevents greater earnings in later periods from reducing back pay accrued for time lost in earlier periods. It is not surprising, therefore, that the Board felt obliged to study a number of methods for achieving this result, and ultimately to select the *Woolworth* formula, which substantially protects the dischargee from the need to waive his right to reinstatement.

In short, it is impossible to devise any system of

---

[11] If it is to be suggested that the waiver be disregarded for all purposes, the suggestion is even less persuasive. Again, it is feasible to invalidate only waivers made before the unfair labor practice hearing, and the right to reinstatement is given no real protection. Such a rule would differ from the rule of the *English Freight* case, note 10, *supra*, only in that it would deprive the discriminatee of even more of the back pay accrued for time lost from work.

ad hoc adjudication which will as nearly effectuate the policies of the Act as does the *Woolworth* formula. If the gist of the decision below is that the Board acted capriciously in devising and applying that formula, we submit that it might more reasonably be said that the Board would have been derelict in its duties under the Act had it not endeavored to devise some such formula, in order to restore as effectively as possible the situation which would have existed but for the discrimination.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment below should be reversed insofar as it denies enforcement to a part of the Board's order, and that the Board's order is valid and proper, and should be enforced in full.

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,
National Labor Relations Board.

DECEMBER 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), as further amended by Public Law 189, October 22, 1951 (82nd Cong., 1st Sess.), are as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabiliza-

tion of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions

of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8 (a). It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be

affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1932 231787 718

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 18 1952

No. 217

In the Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 217

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

In its brief (pp. 5–6), respondent for the first time in the course of this litigation poses a new argument,[1] based on the assumption that an em-

[1] In its brief at page 5, respondent also attributes error to our statement (main brief, p. 34, note 8): "Except for the present case, and one other case in which the employer was represented by the same counsel and which was withdrawn from enforcement for other reasons, *National Labor Relations Board* v. *Pacific Mills*, C. A. 4, No. 6257, 91 NLRB 60, prior to the decision below no objection had been raised to the revised method of computation." The case cited by respondent as an additional exception was decided June 17, 1952, after the April 29, 1952, decision in this case. The issue was not raised in the court of appeals until after the decision in this case, and was not raised at all before the Board.

ployee has been wrongfully discharged from a "seasonal" job, and finds interim employment in a non-seasonal industry. Respondent now suggests (p. 5) that its business is "seasonal," that the problems envisioned by it might therefore be encountered in this case, and that if applied to such a case the *Woolworth* formula (90 N. L. R. B. 289) would make the employee "more than whole." To illustrate its point, respondent offers the following hypothetical figures for the sums which the employee might have earned in the job from which he was discharged and in his interim employment (p. 6):

Quarter	*Estimated Earnings*	*Actual Earnings*
1	$1,800	$1,200
2	600	1,200
3	600	1,200
4	1,800	1,200
	$4,800	$4,800

Respondent concludes that under the *Woolworth* formula the employee would be awarded back pay of $1,200, whereas under the pre-*Woolworth* formula no back pay would be awarded.

Neither conclusion is necessarily correct. While we have shown in our main brief (pp. 26–30) that in many cases it is necessary, in order adequately to compensate the discriminatee for his loss of working time, to award him more back pay than he would have received under the pre-*Woolworth* formula, in respondent's hypothetical case both formulae will lead to the same result.

For respondent's example rests upon fallacious assumptions concerning the computation of gross back pay and interim earnings figures, a step which necessarily precedes application of either the pre-*Woolworth* or the *Woolworth* formula. When these figures are properly computed, application of the *Woolworth* formula leads to the same result as the formula previously in use, and fairly compensates the employee for the time he has lost from work.

The record[2] indicates that the hypothetical fluctuations in the earnings which the employee would have received in his original job would be accompanied by corresponding fluctuations in the time the employee works. Thus, in the second and third quarters of respondent's hypothetical case, the employee apparently would have been working only one third of full time had he not been discharged from his original job. In that event, he "would have sought and . . . obtained employment elsewhere" to occupy the remainder of his time (see *National Labor Relations Board v. Reed & Prince Mfg. Co,* 130 F. 2d 765, 772

[2] Each "driver-salesman" was paid a salary of $12 per week, plus seven cents for each case of 7-Up delivered. See Board's Appendix below, pp. 13–14; Tr. 37. These "driver-salesmen" apparently spend little, if any, time soliciting orders; they are given orders at respondent's office, and make the requisite deliveries. See Respondent's Appendix below, pp. 5–6; Tr. 73. As soon as they have completed their deliveries, they are free. See Board's Appendix below, p. 14; Tr. 39.

(C. A. 1)), thereby earning substantial amounts in addition to the $600 shown in respondent's table. Since the employer is not charged with these additional amounts in computing gross back pay, he cannot fairly derive benefit from the fact that the dischargee was employed elsewhere during the time when he could not have worked in his original job even if he had not been discharged. Accordingly, both before and after the *Woolworth* decision in 1950, in computing interim earnings which are to be deducted from gross back pay, the Board would consider only those interim earnings attributable to the periods when the dischargee would have been working in his original job; in respondent's hypothetical case, the Board would deduct only one third of the actual interim earnings for the second and third quarters from the gross back pay attributable to those quarters. This method of computation was well established before the *Woolworth* formula was devised, and has since been used in applying that formula. See, *e. g., National Labor Relations Board* v. *Reed & Prince Mfg. Co., supra; Earl I. Sifers, d/b/a Sifers Candy Co.*, 92 NLRB 1220, 1249. The table on the opposite page shows that application of either the pre-*Woolworth* formula or the *Woolworth* formula to respondent's hypothesis would result in an award of $1,600. Both formulae reach identical results, just as in any other case where the discriminatee's interim earnings for any quarter do not exceed the amounts he would have

earned in the job from which he was unlawfully discharged. See our main brief at p. 19.

TABLE A

An employee is unlawfully discharged from a seasonal job in which his earnings reflect with reasonable accuracy the hours of work.

Period of Unemployment	Gross Back Pay (seasonal)	Total Actual Earnings (non-seasonal)	Adjusted Interim Earnings	Net Back Pay	
				Pre-*Woolworth*	*Woolworth*
First Quarter	$1800	$1200	$1200	....	$600
Second Quarter	600	1200	400	....	200
Third Quarter	600	1200	400	....	200
Fourth Quarter	1800	1200	1200	....	600
Total	$4800	....	$3200	**$1600**	**$1600**

Respondent's objection goes not to the application of either the *Woolworth* formula or the pre-*Woolworth* formula, but rather to the method of computing the gross back pay and interim earnings to which the formula is to be applied. This computation of course does not take place until after the decree of enforcement is entered. "At the time an order of the Board is enforced the amount of back pay is often not computed. Once an enforcement order issues the Board must work out the details of the back pay that is due and the reinstatement of employees that has been directed. This may be done by negotiation; or it may have to be done in a proceeding before the Board. The computation of the amount due may not be a simple matter." *Nathanson* v. *National Labor Relations Board*, No. 33, this Term, decided Nov. 10, 1952, slip opinion, p. 4.

When in due course a back-pay hearing is held, it is unlikely that the Board will be presented with circumstances raising the problems which respondent poses. If such a situation should appear, presumably the hearing will show that the fluctuations in wages are correlative with fluctuations in working hours, and back pay will properly be computed as indicated above. Admittedly, however, the record is not conclusive on this point; at the hearing on back pay it may develop that respondent's "driver-salesmen" work full time throughout the year, earning less in the second and third quarters because their hours of work are less productive. If so, it may be expected[3] that the Board will take into account the irregular nature of the estimated cash earnings in the original job, and distribute those earnings among the four quarters on an accrual basis, to reflect more accurately the employee's loss of working time in each quarter, inasmuch as the *Woolworth* formula was designed to compensate the employee more accurately for his loss of working time in each quarter. In computing gross back pay, the Board would thus attribute to each

[3] Resort to speculation is necessitated by the hypothetical nature of respondent's argument. It is to be expected that employees wrongfully discharged from seasonal employment will generally find similar jobs in the same locality. Thus, their interim earnings will tend to be "seasonal" in about the same proportion as their gross back pay; the disproportionate hypothesis envisioned by respondent rarely, if ever, arises.

quarter one fourth of the estimated annual gross back pay.[4] In that event, the table below shows that the application of either the pre-*Woolworth* or the *Woolworth* formula would result in no award of back pay whatever.

TABLE B

An employee is unlawfully discharged from a seasonal job in which he works full time throughout the year, but his earnings fluctuate greatly.

Period of Unemployment	Estimated Earnings (seasonal)	Adjusted Gross Back Pay	Interim Earnings (non-seasonal)	Net Back Pay	
				Pre-*Woolworth*	*Woolworth*
First Quarter	$1800	$1200	$1200		0
Second Quarter	600	1200	1200		0
Third Quarter	600	1200	1200		0
Fourth Quarter	1800	1200	1200		0
Total	$4800	$4800	$4800	0	0

Only if the Board should answer these problems in some other way will respondent's argument present a controversy ripe for adjudication. In that event, the issue will not be whether the *Woolworth* formula may be applied, but whether the Board has properly computed the figures to which it should be applied.

[4] This allocation of a lump sum payment among the various quarters would be an obvious necessity in the case of a seaman, for example, who is paid at the end of a voyage for a trip covering many months.

Respectfully submitted.

WALTER J. CUMMINGS, JR.
Solicitor General.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
MOZART G. RATNER,
Assistant General Counsel,
National Labor Relations Board.

DECEMBER 1952.

U. S. GOVERNMENT PRINTING OFFICE: 1952

Office - Supreme Court, U. S.
FILED
AUG 11 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 217.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For the Seven-Up Bottling Company of Miami, Inc., in Opposition.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.,
By FRANK A. CONSTANGY,
ALBERT B. BERNSTEIN,
Its Attorneys.

FRANK A. CONSTANGY,
MARION A. PROWELL,
1404 Candler Building,
Atlanta 3, Georgia,
ALBERT B. BERNSTEIN,
BERNSTEIN & HODSDON,
Seybold Building,
Miami, Florida.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Questions presented	2
Statement	2
Conclusion	11

Cases Cited.

Consolidated Edison Co. v. NLRB, 305 U. S. 197, 235-6	9
NLRB v. American National Insurance Co., 72 S. Ct. 824, 832, 96 L. Ed. 721, 730	5, 6
NLRB v. Fotill Products, Inc., 180 F. 2d 441, 444, 9th Cir.	9
NLRB v. Gullett Gin Co., 340 U. S. 361, 363, 95 L. Ed. 337, 341, 342	7
NLRB v. Marshall Field & Co., 129 F. 2d 169, 172, 7th Cir.	9
Phelps-Dodge Corp. v. NLRB, 313 U. S. 177, 197-198, 61 Sup. Ct. 845, 854	10
Reliance Mfg. Co. v. NLRB, 125 F. 2d 311, 316, 7th Cir.	9
Republic Steel Corp. v. NLRB, 311 U. S. 7, 11, 12, 13, 61 Sup. Ct. 77, 79-80	9, 10
Shell Oil Co. v. NLRB, 196 F. 2d 637	5

Statutes Cited.

National Labor Relations Act, 61 Stat. 136, 29 U. S. C., Supp. IV, 141, et seq.	2
Section 10 (c), Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C., Supp. IV, 141, et seq.	6, 7

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 217.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For the Seven-Up Bottling Company of Miami, Inc., in Opposition.

OPINIONS BELOW.

The opinion of the Court below (R. 124-128) is reported at 196 F. 2d 424; Findings of Fact, Conclusions of Law, and Order of the Board (R. 71-114) are reported at 92 NLRB 1622.

JURISDICTION.

The judgment of the Court below was entered on April 29, 1952 (R. 128). A Petition for Rehearing, filed by the Company on May 6, 1952, was denied on June 18, 1952 (R. 129, 134). The Decree, detailing the terms of the judgment, was entered on July 8, 1952 (R. 135-136). The

jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 136.

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, et seq.), are set forth in the Appendix to the Petition for Certiorari (pp. 16-18).

QUESTIONS PRESENTED.

(1) Shall the Supreme Court grant certiorari to review the finding by the Court of Appeals for the Fifth Circuit that the evidence in the Record before that Court did not support the Decision and Order of the National Labor Relations Board, sought to be enforced in that Court?

(2) Did the Court below err in finding that the Board's departure from the statutory method of calculating back pay, as approved by this Court and by the several Courts of Appeal, was not warranted by the evidence certified by the Board to the Court below?

(3) May the National Labor Relations Board, under the guise of administrative convenience, determine upon a method of awarding back pay under the National Labor Relations Act, which imposes a penalty upon the employer by granting to the employee sums in excess of what such employee would have earned had he remained in the employer's employ?

STATEMENT.

The Court of Appeals for the Fifth Circuit determined that the Transcript of Evidence before the National Labor Relations Board in this case did not contain substantial evidence justifying the computation of back pay in such

a manner as to require the Company to pay sums in excess of the amount an employee would have earned less his actual earnings during the period of discrimination. The terms of the Order of the Board require the Company to compute and pay back pay to employees in each three month period of each calendar year.

The Board's Order, rejected by the Court below, specifically provides that actual earnings for each quarter shall be deducted from normal expected earnings for each quarter but that excess earnings in one quarter shall not be considered as offsetting expected earnings in another quarter. Thus, if in one three month period the actual earnings of the employees were in excess of normal expected earnings from the Company, such excess under the Board's Order could not be offset against earnings in another quarter when the employee, for example, had no actual earnings.

The policy of the Board prior to the so-called "Woolworth Formula" consisted of crediting the employee with all amounts he would have earned had he continued with the employer, less any amounts actually earned from other employment during the same period. This formula achieved the result of putting the employee in the exact financial position he would have been in had no discrimination been visited upon him and, accordingly, the employer was not subjected to additional penalty or punitive award. This, we submit, constitutes "making whole" the employee. The Board's long-standing method of computing back pay was devised following decisions of this Court which, in the early years of the National Labor Relations Board's existence, held that the National Labor Relations Board was without statutory authority or warrant to devise or impose punitive measures against employers in the nature of penalties and fines. Moreover, this Court has in the specific instances cited herein often passed upon the

validity of the Orders of the National Labor Relations Board with respect to remedial directives issued to employers by the Board.

An illustration will demonstrate more clearly the effect of the Board's Order as contrasted with the Judgment and Decree of the Court below. In the case of an employee whose period of discrimination was, for example, from January 1 to December 31 of a single year and whose rate of pay was $500 per month, or $6,000 per annum; if we assume, for the purposes of this illustration, that such employee during the months of January, February, and March of such year earned from outside employment $3,000; during the months of April, May and June earned $300; during the months of July, August and September earned $3,000; and during the months of October, November and December earned $300. The employee's earnings with his former employer, but for the discrimination, would have been $6,000 for the whole period. The employee's earnings during the period of discrimination were actually $6,600. He, therefore, would be entitled to no back pay under the Decree of the Court below. Under the Board's new formula, however, the same employee would have been entitled to no back pay for the first and third quarters and $1,200 for each the second and fourth quarters, or a total back pay of $2,400, in addition to and in spite of the fact that he earned $6,600 in outside employment during the period.

The Board concedes in its Brief in Support of the Petition for Certiorari that the purpose accomplished by the "Woolworth" method of computing back pay invariably results in the employee's receiving all that he would have earned less actual earnings and that in most, if not all, cases, the employee receives amounts in excess of the difference between the amount the employee would have earned and the amount actually earned during the entire

period involved. In substance, the new back pay formula of the Board, as indicated in the Board's Brief, results in an additional payment to the individual employee that the Board seeks to justify as compensation for anticipated indirect or intangible losses which the individual may not have incurred.

The Court below concluded that the Record in this case was devoid of any facts or evidence which would justify the adoption by the Board of a method for computing back pay which was designed to assess against the Respondent amounts in excess of the difference between earnings the employees would have received and amounts they earned elsewhere.* This Court is thus called upon by the Petition for Certiorari to review a determination of a Court of Appeals wherein the Court of Appeals found that the evidence contained in the Record was insufficient to sustain the Order issued by the Board.

This Court recently announced its future intention to refuse to review or to reverse a Court of Appeals on a matter of judgment involving a review of the sufficiency of the Record. The Court in **NLRB v. American National Insurance Company**, decided in May of this year, stated in a like situation:

> ". . . Last term we made it plain that Congress charged the Courts of Appeal, not this Court, with the normal and primary responsibility for reviewing the conclusions of the Board. We stated that this Court 'is not the place to review a conflict of evidence nor to reverse a Court of Appeals, because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find

* Contrary to the statement in the Petition for Certiorari, the United States Court of Appeals for the Fifth Circuit in the matter of **Shell Oil Co. v. NLRB**, 196 F. 2d 637, on June 17, 1952, entered a Supplemental Decision and Decree modifying another Order of the National Labor Relations Board in substantially the same particulars as the Order in this case was modified (30 LRRM 2374, CCH Para. 67048).

it tilting either way.' Labor Board v. Pittsburgh S. S. Co., 340 U. S. 498, 503. We repeat and reaffirm this rule. . . ."

(NLRB v. American National Insurance Co., 72 S. Ct. 824, 832, 96 L. Ed. 721, 730.)

The Board presents no legal justification for its request that a Certiorari issue to the Judgment of the Court of Appeals; indeed, there is none. The Court of Appeals determined that the Record facts did not sustain the Order of the Board. The Petition for Certiorari does not dispute the absence of substantial evidence to support such Order. Instead, the petition assumes the inaccuracy of the Judgment of the Court of Appeals and proceeds to justify levy of a penalty on the basis of administrative expediency which is neither authorized by law nor sanctioned by judicial interpretation.

The authority of the Board to order back pay is found in Section 10 (c) of the Act and provides in this respect:

". . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and **to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.** . . ." (Emphasis supplied.)

[Section 10 (c), Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C., Supp. IV, 141 et seq.]

This Court has recently had an occasion to review the history of the interpretations of the reinstatement and back

pay provisions of the National Labor Relations Act, including prior interpretations by this and the Courts of Appeal. As a result of its survey the Court issued an exact formula for the computation of back pay under Decisions and Orders of the National Labor Relations Board. The language of the Court leaves nothing to be desired in clarity and describes beyond question the exact steps to be employed in determining back pay as authorized by Section 10 (c) of the Act. These standards were described by the Court in the following language:

> ". . . In effectuating the policies of the Act, the Board clearly may award back pay to discriminatorily discharged employees. This means that employees may be reimbursed for earnings lost by reason of the wrongful discharge, from which should be deducted net earnings of employees from other employment during the back pay period, Republic Steel case (U. S.), supra, and also sums which they failed without excuse to earn. Phelps Dodge Corp. v. NLRB, 313 U. S. 177, 197, 198, 85 L. Ed. 1271, 1284, 1285, 61 S. Ct. 845, 133 A. L. R. 1217. . . ."
>
> **(NLRB v. Gullett Gin Co., 340 U. S. 361, 363, 95 L. Ed. 337, 341, 342.)**

This decision becomes even more significant when it is considered as the culmination of earlier decisions wherein this Court specified the limits within which the Orders of the Board must be framed. The Court dwelled at length upon the Orders which the Board might direct to an employer and likewise laid down certain limitations beyond which the Board was prohibited from going in directing reinstatement and back pay.

> ". . . This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise

punitive measures and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial not punitive. Consolidated Edison Co. v. NLRB, 305 U. S. 197, 235, 236 . . . See also NLRB v. Pennsylvania Greyhound Lines, 303 U. S. 261, 267, 268 . . . We adhere to that construction . . .

We think that affirmative action to "effectuate the policies of this Act (chapter)" is action to achieve the remedial objectives which the Act sets forth. Thus the employer may be required not only to end his unfair labor practices; he may also be directed affirmatively to recognize an organization which is found to be the duly chosen bargaining representative of his employees; he may be ordered to cease particular methods of interference, intimidation, or coercion, to stop recognizing and to disestablish a particular labor organization which he dominates or supports, to restore and make whole employees who have been discharged in violation of the Act, to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard. These are all remedial measures. **To go further and require the employer to pay to governments what they have paid to employees for services rendered to them is an exaction neither to make the employees whole nor to assure that they can bargain collectively with the employer through representa-**

tives of their own choice. We find no warrant in the policies of the Act for such an exaction . . .

. . . All these measures related to the protection of the employees and the redress of their grievances, not to redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole . . .

This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order . . ." (Emphasis supplied.)

(Republic Steel Corp. v. NLRB, 311 U. S. 7, 11, 12, 13, 61 Sup. Ct. 77, 79-80).

See also: **Consolidated Edison Co. v. NLRB,** 305 U. S. 197, 235-6; **NLRB v. Fotill Products, Inc.,** 180 F. 2d 441, 444, 9th Cir.; **NLRB v. Marshall Field & Co.,** 129 F. 2d 169, 172, 7th Cir.; **Reliance Mfg. Co. v. NLRB,** 125 F. 2d 311, 316, 7th Cir.

The language of the statute and judicial terminology used in its interpretation have uniformly expressed the Congressional intent to place the employee-discriminatee in status quo; to wit, "back pay," "reinstatement," "remedial," "make whole," "actual losses," "lost earnings," "sums he would have earned," and "restoration." There

are no Court decisions containing language which even implies that the Board may issue punitive orders.

In another decision subsequent to the controlling **Republic Steel** case, this Court re-emphasized that the authority of the Board to order, and the purpose of, "back pay" was to make the employee "whole," rather than to assess a penalty against the employer.

> ". . . Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. Simplicity of administration is thus the justification for deducting only actual earnings and for avoiding the domain of controversy as to wages that might have been earned.
>
> "But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates is administrative resourcefulness . . .".
>
> **(Phelps-Dodge Corp. v. NLRB, 313 U. S. 177, 197-198, 61 Sup. Ct. 845, 854.)**

We submit that it is beyond cavil that the authority of the National Labor Relations Board is limited to issuing remedial orders to effectuate the purposes of the Act.

CONCLUSION.

Since the evidence before the Board and the Court below did not justify the issuance of a punitive back pay directive against the Respondent; and since the National Labor Relations Board is not legally authorized to issue punitive orders, the Court below properly found no basis to justify a Decree directing the computation of back pay on a quarterly basis.

The Decision below is, we submit, correct and presents neither a conflict of decisions nor any substantial question warranting review. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.,

By .....
FRANK A. CONSTANGY,

.....
ALBERT B. BERNSTEIN;
Its Attorneys.

FRANK A. CONSTANGY,
MARION A. PROWELL,
1404 Candler Building,
Atlanta 3, Georgia,

ALBERT B. BERNSTEIN,
BERNSTEIN & HODSDON,
Seybold Building,
Miami, Florida.

Aug. ..., 1952.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
DEC 12 1952

No. 217.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For the Seven-Up Bottling Company of Miami, Inc.

FRANK A. CONSTANGY,
MARION A. PROWELL,
1404 Candler Building,
Atlanta 3, Georgia,
ALBERT B. BERNSTEIN,
BERNSTEIN & HODSDON,
Seybold Building,
Miami, Florida,
Attorneys for Respondent,
Seven-Up Bottling Company of Miami, Inc.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Argument	3
A. The decree of the court below will result in a calculation of "back pay" so as to make the employees "whole" as the terms have been used and interpreted under the National Labor Relations Act without imposing a penalty	3
B. The order of the National Labor Relations Board prior to its modification by the court below would have been penal and not remedial	7
C. The petitioner seeks to impose upon respondent liability for collateral losses on the part of the employees, while denying the respondent credit for collateral benefits	9
D. The petitioner seeks approval of the right to impose a monetary penalty upon an employer who avails himself of his statutory right to judicial review under Section 10 (E) and (F) of the National Labor Relations Act	10
E. The decree of the Court of Appeals modifying the Board's order upon which enforcement was sought, so as to conform it to the evidence and the applicable law, was an appropriate exercise of the statutory authority vested in the Court under Section 10 (e) of the National Labor Relations Act	12

F. By re-enacting without modification the provisions of the original act relating to "back pay" in the 1947 amendments to the National Labor Relations Act, Congress must be assumed to have accepted the construction placed thereon by the Board and approved by the Courts 17

Conclusion 19

Appendix 21

Cases Cited.

American National Insurance Co. v. N. L. R. B., 72 S. Ct. 824, 96 L. Ed. 721 13

Brooklyn Savings Bank v. O'Neil, 324 U. S. 697 ..... 8, 18

Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 235-6 ..... 8, 13

In Re: F. W. Woolworth, 90 N. L. R. B. 289 4

In Re: Penn. Greyhound Lines, 1 N. L. R. B. 1 4

Nathanson v. N. L. R. B., ... U. S. ..., 97 L. Ed., Adv. P. 15, Dec. Nov. 10, 1952 7

N. L. R. B. v. Brashear Frt. Lines, 127 F. (2d) 198, 199-200, 6th Cir. 9

N. L. R. B. v. Fotill Products, Inc., 180 F. 2d 441, 444, 9th Cir. 8

N. L. R. B. v. Greenbaum Tanning Co., 110 F. 2d 988, 989, 7th Cir. (1940) 8

N. L. R. B. v. Gullett Gin Co., 340 U. S. 361, 363, 95 L. Ed. 337, 341, 342 ..... 4, 9, 13, 19

N. L. R. B. v. Marshall Field & Co., 129 F. 2d 169, 172, 7th Cir. 8

Phelps-Dodge v. N. L. R. B., 313 U. S. 177, 197, 198 ..... 7, 8, 13, 16, 18

Pittsburgh Steamship v. N. L. R. B., 180 F. 2d 731, 6th Cir., 340 U. S. 498 13

Reliance Mfg. Co. v. N. L. R. B., 125 F. 2d 311, 316, 7th Cir. 8
Republic Steel v. N. L. R. B., 311 U. S. 7, 9, 61 S. Ct. 77 ..... 4, 5, 8, 9, 13
Shell Oil Company v. N. L. R. B., 196 F. 2d 637 (June 17, 1952) 5
Social Security Board v. Nierotko, 327 U. S. 358, at Fn. 4, p. 360 ..... 5, 10
U. S. v. Missouri Pacific Ry., 218 U. S. 269, 280, 49 S. Ct. 133, 137 11
Universal Camera v. N. L. R. B., 340 U. S. 474 13
Virginia Electric & Power Co. v. N. L. R. B., 63 S. Ct. 1214, 1220, 319 U. S. 533, 544 ..... 8, 16

Statutes Cited.

Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 136 2
61 Stat. 1360, 29 U. S. C. Sup. U. 151 4
28 U. S. C. 1254 2
29 U. S. Supp. V, Sec. 160 (c) 18

No. 217.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For the Seven-Up Bottling Company of Miami, Inc.

OPINIONS BELOW.

The opinion of the Court below (R. 124-128) is reported at 196 F. 2d 424; Findings of Fact, Conclusions of Law, and Order of the Board (R. 71-114) are reported at 92 N. L. R. B. 1622.

JURISDICTION.

The judgment of the Court below was entered on April 29, 1952 (R. 128). A Petition for Rehearing, filed by the Company on May 6, 1952, was denied on June 18, 1952 (R. 129, 134). The Decree, detailing the terms of the judgment, was entered on July 8, 1952 (R. 135-136). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 136. The Petition for Writ of Certiorari was granted on October 13, 1952 (R. 89).

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, 141, et seq.), are set forth in the Appendix to this Brief insofar as they are not set forth in the Appendix to the Petitioner's Brief (pp. 45-48).

ARGUMENT.

A. The Decree of the Court Below Will Result in a Calculation of "Back Pay" So as to Make the Employees "Whole" as the Terms Have Been Used and Interpreted Under the National Labor Relations Act Without Imposing a Penalty.

For a period of nearly 15 years from the first decision rendered by the National Labor Relations Board (In Re: **Penn. Greyhound Lines**, 1 N. L. R. B. 1), until 1950 (In Re: **F. W. Woolworth**, 90 N. L. R. B. 289), the Petitioner has followed in principle a specific formula for the computation of back pay under the National Labor Relations Act, both prior to and subsequent to the extensive amendments to the Act in 1947 (61 Stat. 1360, 29 U. S. C. Sup. U. 151, et seq.). During that period and as recently as January, 1951, from time to time various facets of that formula have been subjected to judicial review in this Court and in the Courts of Appeals. Such judicial review has resulted in modification as to application of various supplementary facets of the formula, but the basic concept of back pay computation has followed the statutory scheme of "making whole" through the medium of "back pay" based upon the difference between the amount the employee would have earned during the period between the time of his wrongful discharge and the time of the offer of reinstatement, less his net earnings during such period, and less such sums as he failed without excuse to earn.

By virtue of its decision in the **F. W. Woolworth** case (supra) the Petitioner has departed from the recognized and judicially approved formula and sought to impose a new concept of calculating back pay by the artificial method of treating each calendar quarter during the period between discharge and offer of reinstatement as a completely unrelated period insofar as other calendars are

concerned. By this formula Petitioner proposed to credit net earnings within this artificially selected calender quarter against what the employee actually earned during such quarter. If the net earnings are less, the employer must pay the difference. If they are more, the excess may not be credited against deficiencies in other quarters.

The Petitioner applied the new formula to this Respondent in its Order in this matter issued **January 26, 1951** (Tr. Vol. 1, pp. 38-42). When the matter came before the Court of Appeals for the Fifth Circuit, Respondent objected to the penal, rather than remedial, nature of the remedy proposed by the Board for computing back pay. The issue was briefed and argued to the Court of Appeals. The Court below in full accord with the pronouncements of this Court in **N. L. R. B. v. Guilett Gin Co.**, to wit:

> ". . . In effectuating the policies of the Act, the Board clearly may award back pay to discriminatorily discharged employees. This means that employees may be reimbursed for earnings lost by reason of the wrongful discharge, from which should be deducted net earnings of employees from other employment during the back pay period; Republic Steel case (U. S.), supra, and also sums which they failed without excuse to earn. Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177, 197, 198, 85 L. Ed. 1271, 1284, 1285, 61 S. Ct. 845, 133 A. L. R. 1217 . . ."
>
> **(N. L. R. B. v. Gullett Gin Co., 340 U. S. 361, 363, 95 L. Ed. 337, 341, 342.)**

And in the earlier **Republic Steel v. N. L. R. B** case, to wit:

> ". . . **The amounts earned** by the employees **before reinstatement were directed to be deducted from their back pay** manifestly **because, having already been received, these amounts were not needed to make the employees whole.** That principle would apply whether

the employees had earned the amounts in public or private employment . . ."

(**Republic Steel v. N. L. R. B.**, 311 U. S. 7, 9, 61 S. Ct. 77). (Emphasis supplied.)

denied enforcement of the Board's Order in this particular and embodied in its Decree a modification which reinstated the judicially approved former method of calculating back pay.[1]

The Court below concluded that the Record in this case was devoid of any facts or evidence which would justify adoption by the Board of a method of computing back pay which was designed to assess against this Respondent amounts in excess of the difference between the earnings the employees would have received and the amounts they had actually earned elsewhere. Contrary to the statement both in the Petition for Certiorari (p. 15) and in the Brief for Petitioner (Fn. 8, p. 34, Pet. Brief), a similar Decree was issued by the Circuit Court of Appeals for the Fifth Circuit in the matter of **Shell Oil Company v. N. L. R. B.**, 196 F. 2d 637 (June 17, 1952). Counsel for this Respondent was not counsel in that matter.

The facts in the Record before the Circuit Court of Appeals indicate that the Respondent's business is seasonal (Vol. III, page 4; App. to Res. Brief in the Court of Appeals). The so-called Woolworth Formula is even more clearly a penalty when applied to the peculiar facts of Respondent's business. Respondent operates a seasonal soft drink business in Miami, Florida. During the off-season employees earn what amounts to a sustaining wage only and the majority of their annual income is received

1 In **Social Security Board v. Nierotko**, 327 U. S. 358, at Fn. 4, p. 360, this Court noted that, according to the briefs of the Government, during the period 1939-1945 (war years and in a period of inflation) "more than 30,000 individuals were allowed 'back pay' in 'closed' cases by the National Labor Relations Board under 10 (c) . . . The aggregate in money exceeded $7,700,000 in the fiscal years 1939-1944 . . ."

during the season. The quarterly earnings of Respondent's employees might well be $4,800 a year represented by quarterly payments of:

	Estimated Earnings	Actual Earnings	Back Pay
1st	$1800	$1200	
2nd	600	1200	
3rd	600	1200	
4th	1800	1200	
	$4800	$4800	00

If the back pay claimant secured interim employment at a rate of $4800 per annum, and was paid at the rate of $400 per month, he would have suffered no loss and there would be no back pay due under the formula approved by this Court, and embodied in the Decree of the Court of Appeals for the Fifth Circuit.

Application of the Board's formula rejected by the Court of Appeals would result in back pay of $1200 to the employee irrespective of the fact that there has been no loss of earnings:

	Estimated Earnings	Actual Earnings	Back Pay
1st	$1800	$1200	$600
2nd	600	1200	
3rd	600	1200	
4th	1800	1200	600
			$1200

Ultimately the Petitioner argues that this Court should modify a determination of the Court of Appeals based on the evidence in the Record before that Court which the Court found to be insufficient to sustain the Board's radical departure from the judicially approved method of cal-

culating back pay.[2] The Court of Appeals found that the remedy sought by the Board would, on the basis of evidence before the Court, impose a penalty rather than a restoration of status quo ante, consequently the Court embodied the normal, approved method of calculation of back pay in its Decree. See footnote 10, p. 14, infra.

B. The Order of the National Labor Relations Board Prior to Its Modification by the Court Below Would Have Been Penal and Not Remedial.

It is substantially conceded by Petitioner in its Brief in Support of the Petition for Certiorari and in its Brief that the formula rejected in the instant case by the Court of Appeals will in every instance result in the employee's receiving all that he would have earned from the former employer. Moreover it appears that in most, if not all, instances the employee would receive amounts in excess of the difference between the amount he would have earned and the amount he actually earned during the entire period involved.

Such excess payment is a penalty and is designed as such. The language of the statute and judicial terminology used in its interpretation have uniformly expressed the Congressional intent to place the employee-discriminatee in status quo, to wit, "back pay," "reinstatement," "remedial," "make whole," "actual losses," "lost earnings," "sums he would have earned," and "restoration."

---

2 ". . . Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. **Since only actual losses should be made good,** it seems fair that deductions should be made not only for actual earnings by the workers, but for losses which he wilfully incurred." (Emphasis supplied.)

(Phelps-Dodge v. N. L. R. B., 313 U. S. 177, 197, 198.)

"A back pay order is a reparation designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice."

(Nathanson v. N. L. R. B., . . U. S. . . ., 97 L. Ed., Adv. P. 15, Dec. Nov. 10, 1952.)

There is no statutory or judicial authority for the proposition that the National Labor Relations Board may issue punitive orders. There is substantial authority to the contrary.[3]

This Court has clearly indicated that an order making an employee more than "whole" would be "penal".[4]

Unlike the Fair Labor Standards Act involved in **Brooklyn Savings Bank v. O'Neil**, 324 U. S. 697, adverted to in Petitioner's Brief, the National Labor Relations Act does not contemplate or provide for penalties or liquidated damages. Absent statutory provisions therefor the Board may not impose penalties either to correct alleged social injustices arising under the Act, to avoid administrative difficulties or to speed up enforcement.[5]

---

[3] **Republic Steel Co. v. N. L. R. B.**, 311 U. S. 7, 61 S. Ct. 77; **Phelps-Dodge Co. v. N. L. R. B.**, 313 U. S. 177, 61 S. Ct. 845; **Consolidated Edison Co. v. N. L. R. B.**, 305 U. S. 197, 235-6; **N. L. R. B. v. Fotill Products, Inc.**, 180 F. 2d 441, 444, 9th Cir.; **N. L. R. B. v. Marshall Field & Co.**, 129 F. 2d 169, 172, 7th Cir.; **Reliance Mfg. Co. v. N. L. R. B.**, 125 F. 2d 311, 316, 7th Cir.; **N. L. R. B. v. Greenbaum Tanning Co.**, 110 F. 2d 988, 989, 7th Cir. (1940).

[4] "This reimbursement order cannot be labeled 'penal' . . . This is not a case in which the Board has ordered the payment of sums to third parties, or has made employees more than whole . . . ."

(Virginia Electric & Power Co. v. N. L. R. B., 63 S. Ct. 1214, 1220, 319 U. S. 533, 544.)

[5] ". . . As the sole basis for the claim of authority to go further and to demand payments to governments, the Board relies on the language of Section 10 (c) which provides that if upon evidence the Board finds that the person against whom the complaint is lodged has engaged in an unfair labor practice, the Board shall issue an order . . . 'requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.'

"This language should be construed in harmony with the spirit and remedial purposes of the Act. **We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act.** We have said that **'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.'** We have said that the power to command affirmative action is remedial, not punitive. Consolidated Edison Company v. National Labor Relations Board, 305 U. S. 197, 235, 236, 59 S. Ct. 206, 219, 83 L. Ed. 126. See, also, National Labor Relations Board v. Pennsylvania Greyhound Lines, 305 U. S. 261, 267,

C. The Petitioner Seeks to Impose Upon Respondent Liability for Collateral Losses on the Part of the Employees, While Denying the Respondent Credit for Collateral Benefits.

In the matter of **N. L. R. B. v. Gullett Gin,** 340 U. S. 362, 95 L. Ed. 343, this Court rejected the contention of an employer that it was entitled to offset against back pay, ordered by the National Labor Relations Board, certain sums of money which the employees had received by way of unemployment compensation benefits, on the ground that these benefits were collateral benefits that the employees would normally not have received and which ultimately were chargeable against the employer as a result of affecting its experience rating.

> ". . . Since **no consideration** has been given or **should be given to collateral losses** in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received . . ." (Emphasis supplied.)
>
> **(N. L. R. B. v. Gullett Gin Co., 95 L. Ed. 338, 341, 340 U. S. 361, 364);**
>
> See also N. L. R. B. v. Brashear Frt. Lines, 127 F. (2d) 198, 199-200, 6th Cir.

That principle is here applicable.

In support of its argument, that in spite of the **Gullett Gin** decision, supra, it may predicate a calculation of back pay upon a reimbursement of collateral losses the Petitioner

---

268, 58 S. Ct. 571, 574, 575, 82 L. Ed. 831, 115 A. L. R. 307. We adhere to that construction.

"In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end . . ." (Emphasis supplied.)

(Republic Steel Co. v. N. L. R. B., 311 U. S. P. 7, 9, 61 S. Ct. 77, 78.)

cites the problem of crediting "quarters of coverage" to the employee under the Social Security Act. We submit that this Court in its decision in **Social Security Board v. Nierotko**, 327 U. S. 358, 90 L. Ed. 728, robbed that argument of validity. The Court held that back pay should be "allocated to the periods when regular wages were not paid," with full recognition that while this would entail accounting difficulties, such difficulties would not be "insuperable."[6]

D. The Petitioner Seeks Approval of the Right to Impose a Monetary Penalty Upon an Employer Who Avails Himself of His Statutory Right to Judicial Review Under Section 10 (E) and (F) of the National Labor Relations Act.

The underlying purpose and gravamen of the argument in Petitioner's Brief is that the so-called "Woolworth Formula" rightfully and properly assesses a penalty against employers who avail themselves of their statutory right to obtain judicial review of Orders of the National Labor Relations Board. The argument advanced by the Petitioner, in its Brief, is that the decision of the Court of Appeals for the Fifth Circuit should be reversed by this Court because this Respondent, and others similarly situated, may properly be penalized by it, because the delay incident to such judicial review constitutes a diminution of the authority or power of the Board and thereby im-

---

6 "Petitioner further questions the validity of the decision of the Circuit Court of Appeals on the ground that it must be inferred from the opinion that the 'back pay' must be allocated as wages by the Board to the 'calendar quarters' of the year in which the money would have been earned, if the employee had not been wrongfully discharged. We think this inference is correct. This conclusion, petitioner argues, tends to show that 'back pay' cannot be wages because the Amendments of 1939 use 'quarters' as the basis for eligibility as well as the measure of benefits and require 'wages' to be 'paid' in certain 'quarters.'

"If, as we have held above, 'back pay' is to be treated as wages, we have no doubt that it should be allocated to the periods when the regular wages were not paid as usual. Admittedly there are accounting difficulties which the Board will be called upon to solve, but we do not believe they are insuperable."

(Social Security Board v. Nierotko, supra, at p. 370.)

pedes its enforcement of the Act. We respectfully submit that judicial review of Orders of the National Labor Relations Board has not been so completely fruitless and has not so uniformly resulted in enforcement of the decisions of the Board without modification as to enable the Board to properly characterize determinations to seek judicial review of Board Orders as dilatory tactics.

We submit that under our system of laws that it would be entirely inappropriate to have vested in one of the potential adversaries or litigants, under a statutory scheme which provides for judicial review, the power to penalize its adversary party for availing himself of his statutory right to obtain such judicial review. Nor would it be appropriate to vest an administrative agency with a weapon to use, in its discretion, to discourage the use of judicial review where such review is in contemplation under the statute. Even though there may be disagreements as to the appropriateness of such a course, the fact is inescapable that Congress did not intend to, and did not vest in the National Labor Relations Board the power or authority to penalize a Respondent because of, or to penalize a Respondent to prevent use of, its statutory right to judicial review of Board Orders, either by direct appeal or by resistance to Petitions for Enforcement.

The Orders of the National Labor Relations Board by express design of Congress, and not by inadvertence, are not self-enforcing. Enforcement is vested in the several Courts of Appeals. To uphold the imposition of, a penalty upon a Respondent who either seeks judicial review of an Order of an administrative agency or who resists enforcement for valid, to it, legal reasons; albeit not necessarily sustained by the Court of Appeals, would strike at the foundations of our judicial system, and defeat the express statutory right to judicial review.[7] Petitioner can cite no

[7] "Departments may not under the guise of construction restrict or enlarge the meaning of the Act."

(U. S. v. Missouri Pacific Ry., 218 U. S. 269, 280, 49 S. Ct. 133, 137.)

authority either by way of statute, or decisions, of this or any other Court (and we have found none), which support its attempt here to obtain approval of a formula designed to curtail, limit, or prohibit judicial review of its decisions through the medium of imposition of a financial penalty.

E. The Decree of the Court of Appeals Modifying the Board's Order Upon Which Enforcement Was Sought, So as to Conform It to the Evidence and the Applicable Law, Was an Appropriate Exercise of the Statutory Authority Vested in the Court Under Section 10 (e) of the National Labor Relations Act.

It may not properly be contended that the Court of Appeals by its Decree has failed to "guard against the danger of sliding . . . from the narrow confines of law into the more spacious domain of policy." It is inescapable that as of the time of the Petition for Enforcement to the Court of Appeals in this matter, that the Court of Appeals for the Fifth Circuit, the other Courts of Appeals, and this Court had had before them, on many occasions the question of construction of the provisions for "back pay" which have remained unchanged in the National Labor Relations Act since its passage in 1935. As a result thereof a virtually universal construction of the phrase, its meaning and operation had developed. This construction was both administrative and judicial. In the light of such uniform construction[8] the Court of Appeals examined the

---

[8] ". . . This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 235, 236. . . . See also N. L. R. B. v. Pennsylvania Greyhound Lines, 303 U. S. 261, 267, 268. . . . We adhere to that construction . . .

"We think that affirmative action to 'effectuate the policies of this Act (chapter)' is action to achieve the remedial objectives which the Act sets

departure from the accepted construction of "back pay" as embodied in the Order of the Board upon which enforcement was sought, and as challenged by this Respondent. It reviewed the evidence in the Record. It heard the Petitioner's arguments that its proposed method of calculating "back pay" would only make the employees "whole." A review of the evidence by the Court of Appeals indicated that there was no evidence to support such contention by Petitioner. The Court of Appeals thereupon properly rejected the contention.[9] Moreover, it found that the facts in the Record supported a Decree embodying the normal method of calculating "back pay" as embodied in the administrative, as well as judicial,

---

forth. Thus the employer may be required not only to end his unfair labor practices; he may also be directed affirmatively to recognize an organization which is found to be the duly chosen bargaining representative of his employees; he may be ordered to cease particular methods of interference, intimidation, or coercion, to stop recognizing and to disestablish a particular labor organization which he dominates or supports, to restore and make whole employees who have been discharged in violation of the Act, to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard. These are all remedial measures. To go further and require the employer to pay to governments what they have paid to employees for services rendered to them is an exaction neither to make the employees whole nor to assure that they can bargain collectively with the employer through representatives of their own choice. We find no warrant in the policies of the Act for such an exaction . . .

". . . All these measures related to the protection of the employees and the redress of their grievances, not to redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole.

This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order . . .

(Republic Steel Corp. v. N. L. R. B., 311 U. S. 7, 11, 12, 13, 61 S. Ct. 77, 79, 80.)

See, also, Phelps-Dodge v. N. L. R. B., supra; N. L. R. B. v. Gullett Gin Co., supra, and Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197.

[9] Universal Camera v. N. L. R. B., 340 U. S. 474; Pittsburgh Steamship v. N. L. R. B., 180 F. 2d 731, 6th Cir., 340 U. S. 498; American National Insurance Co. v. N. L. R. B., 72 S. Ct. 824, 96 L. Ed. 721.

construction of the term as used in the National Labor Relations Act. It therefore appropriately embodied such construction in its Opinion and Decree.[10]

[10] . . . employees covered by the order of January 30, 1951, are entitled to reinstatement with back pay, but we differ with the Board as to the method of computation.

"Prior to its decision of June 12, 1950, in the **Woolworth** case, 90 N. L. R. B. 289, the Board awarded the employee a sum equal to what he would have normally earned over the entire period of suspension, less his actual net earnings in other employment during that entire period. Beginning with the **Woolworth** case, however, the Board requires back pay to be computed on a quarterly basis, each quarter standing upon a segregated basis. That method was ordered here.

"Respondent objects to the latter method, asserting that since excess earnings by the employee in one quarter do not operate to offset deficiencies in the earnings of another quarter, it would frequently result that the suspended employee would receive more in back pay, computed on that basis, than he would have earned in uninterrupted employment.

"The Board justifies its new method of computation upon the ground that employers have sometimes deliberately refrained from offering reinstatement to employees earning higher wages with another employer, because they knew that the greater the delay, the greater would be the reduction in their back pay liability. Thus, says the Board, a recalcitrant employer may profit by continuing to withhold reinstatement from a Union adherent who is then earning more with a new employer than he received from the old. Moreover, says the Board, suspended employees who are receiving higher pay from another employer, and who are therefore faced with the prospect of steadily diminishing back pay from their former employer, have thus been induced to waive their right to reinstatement in order to stop the running of back pay, and thus preserve the amount then owing them.

"Whatever method of computation is used, there will be occasional hardship cases one way or the other, but these exceptional cases should not determine the rule. The ordinary case should be the criterion. The employee is entitled to be made whole, but no more. The employees here involved were not compensated on a quarterly basis. We see no sufficient reason to so compute their back pay during suspension. When a hardship case arises, it can be decided on its own facts. It does not appear that these employees will not be made whole by computing their back pay continuously over the whole period of their suspension, the method followed by the Board itself prior to the **Woolworth** case. We hold such method, rather than the quarterly method, should be followed here. There is nothing to indicate that the conditions apprehended by the Board in the **Woolworth** case exist here.

"With that exception, the Board's order under consideration is Enforced."

(Volume I, Tr. pp. 75, 76; Original Print pp. 127, 128.)

196 F. (2d) 424, 427-8.

. . . (c) Make whole the employees whose names are set forth in 'Appendix A,' attached hereto, for any loss of pay each may have suffered as a result of the Respondent's discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned from the date of the discrimination, September 16, 1948, to the date of the Respondent's offer of reinstatement, less his net earnings during said period;

(Volume I, Tr. p. 85; Original Print p. 137.)

In its Brief (page 31) Petitioner indulges in what it aptly characterizes as "word play" by the argument that the Court below in saying that the Board's (Woolworth) formula would "frequently result that the suspended employee would receive more in back pay than he would have earned in uninterrupted employment" infers that "back pay" is designed to bring to the discriminatee **exactly** the amount that he would have earned from the employer as "**back pay.**" What the discriminatee is entitled to is to be made whole in terms of **pay**. This Court, the Court below and the other Courts of Appeals, and the Board itself, have held that making "whole" contemplated that the employee would receive in "**pay**" as much money as he would have earned had he remained in the employ of the discharging employer; and that should the employee have received less in **pay** during the interim between discharge and offer of reinstatement (except where that receiving of less pay was due to his willful act), he shall be entitled to receive the difference between expected earnings and actual pay for the period in "**back pay**" in order that he be "made whole."

In the Phelps-Dodge case, supra, referred to in both the Petitioner's and this Brief, this Court has specifically pointed out that the remedy of reinstatement is completely independent of, and not contingent upon, the obligation to make whole from a monetary standpoint. Moreover, the Act under which the Board's Order was issued prescribes that reinstatement shall be ordered "with or without back pay." This Court in the Phelps-Dodge case held that under the National Labor Relations Act reinstatement may be ordered by the Board even though the discriminatee had obtained a full-time, more lucrative job, and even though the discriminatee was actually employed at such a job as of the time of the Board's Order at the time of a Decree of Enforcement.[11]

[11] "... The Board will thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by

In the Phelps-Dodge case this Court also held that the Board in calculating back pay could not ignore the "just doctrine of mitigation of damages" because of alleged administrative difficulty or in the interest of "avoiding the domain of controversy."[12]

The formula advocated by the Petitioner, in the Court of Appeals and in this Court, by Petitioner's own admission, impairs and disregards the concept of mitigation of damages. The flagrant disregard of the "socially desirable" and "just doctrine" of mitigation of damages in an effort to avert the remote contingency, not established in this Record, that the desire for greater financial return might conceivably cause an employee to waive his right to reinstatement is, we submit, both contrary to law and an abuse of discretion. As such it is "a patent attempt to achieve ends other than those fairly certain to effectuate the policies of the Act."[13]

---

employees, while at the same time it may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment. By leaving such an adjustment to the administrative process we have in mind not so much the minimization of damages as the healthy policy of promoting production and employment. This consideration in no way weakens the enforcement of the policies of the Act by exerting coercion against men who have been unfairly denied employment to take employment elsewhere and later, because of their new employment, declaring them barred from returning to the jobs of their choice. This is so because we hold that the power of ordering offers of employment rests with the Board even as to workers who have obtained equivalent employment. . . ."

(Phelps-Dodge v. N. L. R. B., supra, at pp. 199, 200.)

12 ". . . Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. **Since only actual losses should be made good,** it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. Simplicity of administration is thus the justification for deducting only actual earnings and for avoiding the domain of controversy as to wages that might have been earned.

"But the **advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment.** The Board, we believe, overestimates administrative difficulties and underestimates administrative resourcefulness . . ." (Emphasis supplied.)

(Phelps-Dodge v. N. L. R. B., supra, at p. 854.)

13 Virginia Electric & Power Co. v. N. L. R. B., 319 U. S. 533, 540.

F. By Re-enacting Without Modification the Provisions of the Original Act Relating to "Back Pay" in the 1947 Amendments to the National Labor Relations Act, Congress Must Be Assumed to Have Accepted the Construction Placed Thereon by the Board and Approved by the Courts.

By re-enacting the language of Section 10 (c)[14] of the Act relating to "back pay" without modification Congress asserted its approval of the formula used by the National Labor Relations Board for computing back pay from the period 1935-1950 as affirmed with certain modifications by this Court and the Courts of Appeals.

The Petitioner argues (Pet. Brief p. 10 et seq.) that beginning in 1940 it observed that the formula being used by it for calculating back pay (beginning in 1935) was not yielding some of the results which the Petitioner apparently desired. In 1941 this Court in its decision in the Phelps-Dodge matter, supra, reviewed the entire question of the back pay formula and policies of the National Labor Relations Board and approved with certain modifications the various elements in the back pay formula which had been adopted and used by the Board since its inception.[15]

The Petitioner refers in its Brief to a staff memorandum issued by members of the Petitioner's staff in 1946 (Fns. 2 and 3, pp. 12, 13, Pet. Br.), which apparently further specified the allegedly unsatisfactory results growing out of the formula for the computation of back pay. These two dates (1940, 1946) are significant since in 1947 the National Labor Relations Act was substantially amended, revised, and in many particulars rewritten. Hearings before the 80th Congress on what ultimately came to be known as the "Taft-Hartley Act" were extensive during the early part of 1947. Representatives of the Petitioner

14 29 U. S. Supp. V, Sec. 160 (c).

15 Phelps-Dodge Corp. v. N. L. R. B., supra, at pp. 197-199, and Fn. 7, at p. 199.

were called upon to testify before members of Congress to present their views and suggestions as to revisions and proposals of the Act. There is no showing that Petitioner, or its representatives made any representations to any of the Committees of Congress in connection with the method of calculating back pay as embodied in 10 (c) of the Act. Nor was it submitted or suggested that Congress grant to the Board the power to assess liquidated damages (a power vested in the administrator of the Fair Labor Standards Act, see **Brooklyn Savings Bank v. O'Neil**, supra). We avert to the fact that these Congressional hearings occurred after the Petitioner noted in 1940 the alleged unsatisfactory results of its back pay formula; and, after the issuance of the staff memorandum in 1946 to the same general effect; and after the Courts, including this Court, had passed upon and affirmed with some modification the formula which had been adopted by the Board, and which had as of the time of the Congressional hearings in 1947 been in use for more than 10 years. The Congress in enacting the Taft-Hartley Act re-enacted the back pay provisions of the original Act. It used the identical language as to "back pay" in Sec. 10 (c) of the amended Act. We submit that Congress must be assumed to have been aware of the formula used by the Board for calculating back pay; and aware of the interpretations and decisions of this and several Courts of Appeals in connection with that formula. We submit that if Congress had any intention of modifying the formula or the judicial interpretations thereof, it would have done so. By "re-enacting [10 (c)] without pertinent modification . . . Congress accepted the construction placed thereon by the Board and approved by the Courts."[16]

---

[16] ". . . Our holding is supported by the fact that when Congress amended the National Labor Relations Act in 1947, the Board had for many years been following the practice of disallowing deduction for collateral benefits such as unemployment compensation. During this period the Board's practice had been challenged before the courts in only two cases, and in both the Board's position was sustained. National La-

This quoted excerpt from the recent decision of this Court in the **Gullett Gin** case is, we submit, completely applicable to the case at bar.

CONCLUSION.

For the reasons stated above, it is respectfully submitted that the decision of the Court of Appeals below should be affirmed.

Respectfully submitted,

FRANK A. CONSTANGY,
MARION A. PROWELL,
1404 Candler Building,
Atlanta 3, Georgia,

ALBERT B. BERNSTEIN,
BERNSTEIN & HODSDON,
Seybold Building,
Miami, Florida,

Attorneys for Respondent, Seven-Up Bottling Company of Miami, Inc.

December, 1952.

---

bor Relations Board v. Marshall Field & Co. (C. A. 7th), 129 F. 2d 169, 144 A. L. R. 394; National Labor Relations Board v. Brashear Freight Lines (C. A. 8th), 127 F. 2d 198. In the course of adopting the 1947 amendments Congress considered in great detail the provisions of the earlier legislation as they had been applied by the Board.

"Under these circumstances it is a fair assumption that by re-enacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the Courts. See Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110, 114, 115, 83 L. Ed. 536, 540, 541, 59 S. Ct. 423; Brewster v. Gage, 280 U. S. 327, 337, 74 L. Ed. 457, 463, 50 S. Ct. 115; Norwegian Nitrogen Products Co. v. United States, 288 U. S. 284, 313-315, 77 L. Ed. 796, 806, 807, 53 S. Ct. 350. . . ."

N. L. R. B. v. Gullett Gin Co., supra, at pp. 365, 366.

APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 et seq.), as further amended by Public Law 189, October 22, 1951 (82nd Cong., 1st Sess.), other than those set forth in the Appendix to Petitioner's Brief (pp. 45-48) are:

Section 9 (e)—"The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of Appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial

evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., Title 28, Secs. 346 and 347).

Section 9 (f)—"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon

the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under the subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence in the record considered as a whole shall in like manner be conclusive."